Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

~~IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION.~~

~~APPEAL OF: JOHN CONBOY,~~

THE PILLSBURY COMPANY, ET AL.,
OPT-OUT PLAINTIFFS,

Petitioners,

vs.

JOHN CONBOY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANCIS J. McCONNELL
135 S. LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131

Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether, under the use immunity statute, a deponent's civil deposition testimony, which repeats verbatim or closely tracks his prior immunized testimony, is "information directly or indirectly derived from such [immunized] testimony or other information" and is therefore unavailable for use against him in any subsequent criminal prosecution?

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LIST OF PARTIES

Petitioners, Opt-Out Plaintiffs

THE PILLSBURY COMPANY — No. H-79-1044
BURGER KING CORPORATION
FOX DELUXE PIZZA COMPANY
POPPIN FRESH PIES, INC.
RENOWN, INC.
SPEAS COMPANY
STEAK AND ALE RESTAURANTS OF AMERICA

DEAN FOODS COMPANY — No. H-78-2004
GREEN BAY FOODS COMPANY
DEAN FOODS PRODUCTS COMPANY
DEAN MILK COMPANY, INC.
LIBERTY DAIRY COMPANY
BOWMAN DAIRY COMPANY, INC.
GANDY'S DAIRIES, INC.

UNITED STATES GYPSUM COMPANY — No. H-80-714
A. P. GREEN REFRACTORIES COMPANY
CANADIAN GYPSUM COMPANY, LTD.
DURABOND PRODUCTS COMPANY
KINKEAD INDUSTRIES, INCORPORATED
HOLLYTEX CARPET MILLS, INC.

GREEN GIANT COMPANY — No. H-80-713

Francis J. McConnell
McConnell & Campbell
135 South LaSalle Street
Suite 4310
Chicago, IL 60603
(312) 726-9131

KRAFT, INC. ALUMINUM SPECIALTY COMPANY METROPAK CONTAINERS CORPORATION UNIVERSAL PACKAGING CORPORATION	No. H-80-1145
ANCHOR HOCKING ANCHOR HOCKING GLASS CORPORATION AMEROCK CORPORATION MOLDCRAFT, INC. THE PHOENIX GLASS COMPANY CARR-LOWERY GLASS COMPANY	No. H-80-1153
WILSON FOODS CORPORATION WILSON CERTIFIED FOODS, INC. WILSON LAUREL FARMS, INC. WILSON-SINCLAIR COMPANY WILSON BEEF & LAMB COMPANY AJN CORPORATION ANDERSON MEAT & PROVISIONS, INC. BRIGGS AND COMPANY FISCHER PACKING COMPANY WILLIAMS MEAT COMPANY, INC.	No. H-80-1142
ARMOUR AND COMPANY ARMOUR FOOD COMPANY ARMOUR-DIAL, INC.	No. H-80-1146

Jerrold E. Salzman
Freeman, Rothe, Freeman & Salzman
One IBM Plaza
Suite 3200
Chicago, IL 60611
(312) 222-5100

METRO MOLDING CORPORATION	No. H-79-1086

SUNMARK, INC.	No. H-78-1815
BREAKER CONFECTIONS	
SUNLINE BRANDS	
CONCORDE CONFECTIONS	
DAVID & SONS (SUNSNAX-FRESNO)	
DAVID & SONS (SUNSNAX-ST. LOUIS)	
SUNFIELD FOODS	
SUNMARK MANUFACTURING	

INTERNATIONAL CAN CORPORATION	No. H-80-1144

Marvin N. Benn
Hamman, Benn & Miller
Xerox Centre
Suite 1620
Chicago, IL 60603
(312) 372-2926

MCGRAW EDISON COMPANY	No. H-80-1149
FOODSERVICE EQUIPMENT DIVISION	
HALO LIGHTING DIVISION	
AREA LIGHTING OPERATIONS	
INTERNATIONAL METAL PRODUCTS	
BUSSMANN DIVISION	
CLARKE-GRAVELY CORPORATION	
CLARKE PRODUCTS	
GRAVELY PRODUCTS	
ONAN CORPORATION	
ELECTRIC MACHINERY MANUFACTURING CO.	
POWER SYSTEMS DIVISION	
NATIONAL ELECTRIC COIL DIVISION	
WORTHINGTON SERVICE OPERATIONS	
CAMPBELL CHAIN COMPANY	

WAGNER ELECTRIC CORPORATION
MASONEILAN INTERNATIONAL, INC.
TURBODYNE CORPORATION
WORTHINGTON COMPRESSORS, INC.
WORTHINGTON PUMP, INC.
AIR COMFORT DIVISION
COMMERCIAL DEVELOPMENT DIVISION
PORTABLE APPLIANCE AND TOOL
MODERN MAID
SPEED QUEEN
TOASTMASTER

NORTHWEST WHOLESALE, INC. — No. H-80-1151
ALLSTOT WAREHOUSE
AUSTIN-PETERSON WAREHOUSE
BLUE STAR GROWERS
BREWSTER HEIGHTS PACKING
BREWSTER MUTUAL GROWERS
CARIBOO GROWERS, INC.
CASCOA GROWERS
CASHMERE FRUIT EXCHANGE
CHELAN APPLE COMPANY
BLUE CHELAN, INC.
CHIEF TANASKET GROWERS
COLUMBIA RIVER ORCHARDS
BIG "O" GROWERS, INC.
CRANE & CRANE
ENTIAT VALLEY ORCHARDS
HOLMAN & HOLMAN
HOLT & ROBISON
KEYSTONE FRUIT COMPANY
LEAVENWORTH FRUIT COMPANY
J. K. MCARTHUR
MALAGA CO-OP

MANSON GROWERS COOPERATIVE
METHOW-PATEROS GROWERS
JOHN NEFF ORCHARDS
NICKELL ORCHARDS
NORTH COUNTRY FRUITS
OKANOGAN GROWERS UNION
OMAK FRUIT GROWERS
OMAK-OKANOGAN GROWERS
ORONDO FRUIT SHIPPERS
OROVILLE-CORDELL FRUIT
GOLD DIGGERS APPLES
PESHASTIN CO-OP GROWERS
PESHASTIN FRUIT GROWERS
PHILLIPPI FRUIT
REGAL FRUIT COOPERATIVE
REMLEY ORCHARDS
SKOOKUM, INC.
SQUAW CREED ORCHARD
STEMILT GROWERS
THE APPLE HOUSE
D. A. THORNDIKE
WASHINGTON FRUIT GROWERS
WENATCHEE WENOKA GROWERS
ZANOL ORCHARDS

WENOKA SUPPLY CO. — No. H-80-1148
BLUE STAR GROWERS, INC.
WENATCHEE WENOKA GROWERS ASSOCIATION
PESHASTIN COOPERATIVE GROWERS (HI-U GROWERS)
MAD RIVER ORCHARD COMPANY, INC.
LAKE ENTIAT GROWERS, INC.
METHOW-PATEROS GROWERS, INC.

LAKE CHELAN FRUIT GROWERS (TROUT)
OKANOGAN GROWERS UNION, INC.
MUTUAL APPLE GROWERS, INC. (MAGI)
OMAK FRUIT GROWERS
ORO FRUIT COMPANY CARIBOO GROWERS, INC.
HEAVYPACK, INC.

RICELAND FOODS, INC — No. H-80-1147
ARKANSAS RICE GROWERS COOPERATIVE ASSOCIATION
ARKANSAS RICE GROWERS COOPERATIVE ASSOCIATION, D/B/A RICELAND FOODS

DUTCH BOY, INC, — No. H-80-1152
CULLMAN PRODUCTS
GLOW-LITE
RHODES PLASTICS
SOLAR ELECTRIC
HARVEL INDUSTRIES
MUELLER ENGINEERING
BALTIMORE PAINT & CHEMICAL CO.
THE SYNKOLOID COMPANY

Robert Goldberg
Freeman, Atkins & Coleman
100 W. Monroe
Chicago, IL 60603

Respondent

John Conboy

Defendants

ALTON BOX BOARD COMPANY

BOISE CASCADE CORPORATION

CHESAPEAKE CORPORATION OF VIRGINIA

CONSOLIDATED PACKAGING CORPORATION

CONTAINER CORPORATION OF AMERICA

THE CONTINENTAL GROUP

CROWN-ZELLERBACH

DIAMOND INTERNATIONAL

DURA CONTAINERS

FIBRE BOX ASSOCIATION

FIBREBOARD

GEORGIA-PACIFIC CORPORATION

GREEN BAY PACKAGING

HOERNER WALDORF CORPORATION

INLAND CONTAINER

INTERNATIONAL PAPER CO.

INTERSTATE CONTAINERS

LONGVIEW FIBRE COMPANY

MACMILLAN BLOEDEL, INC.

MACMILLAN BLOEDEL CONTAINERS

THE MEAD CORPORATION

MENASHA CORPORATION

OLINKRAFT, INC.

OWENS-ILLINOIS, INC.

PACKAGING CORPORATION OF AMERICA

POTLATCH CORPORATION

ST. JOE PAPER COMPANY

ST. REGIS PAPER COMPANY

SOUTHWEST FOREST INDUSTRIES, INC.

STONE CONTAINER CORPORATION

UNION CAMP CORPORATION

U. S. CORRUGATED FIBREBOX

WESTERN KRAFT EAST, INC.

WESTVACO CORPORATION

WEYERHAEUSER COMPANY

WILLAMETTE INDUSTRIES

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In The

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October Term, 1981

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION.

APPEAL OF: JOHN CONBOY,

THE PILLSBURY COMPANY, ET AL., OPT-OUT PLAINTIFFS,

Petitioners,

vs.

JOHN CONBOY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, opt-out plaintiffs in *In Re Corrugated Container Antitrust Litigation*, MDL 310 (S.D. Tex.), pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on October 16, 1981.

CITATIONS TO OPINIONS BELOW

The *en banc* opinion of the Court of Appeals is printed in Appendix A, *infra*, pp. 1a-30a. The panel opinion of the Court of Appeals is printed in Appendix A, *infra*, pp. 31a-67a. The District Court Memorandum Opinion is printed in Appendix A, *infra*, pp. 68a-70a.

JURISDICTION

The panel opinion was entered July 17, 1981. Conboy's petition for rehearing *en banc* was granted September 2, 1981. The *en banc* opinion of the Court of Appeals was entered on October 16, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTES INVOLVED

The statutory provisions involved are Sections 3001, 6002, and 6003 of the use immunity statutes, 18 U.S.C. §§6001-6005 (1976). The statute is printed in Appendix B, *infra*, p. 72a. Section 6002 provides, in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information to—(1) a court or grand jury of the United States, and the person presiding
>
> * * *

> over the proceedings communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; *but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.* (emphasis added)

The constitutional provision involved is the Fifth Amendment to the United States Constitution, U.S. CONST. amend. V, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a persentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

John A. Conboy is a former executive of the defendant Weyerhaeuser Company. He was one of numerous witnesses who testified before the grand jury under a grant of immunity in an investigation of the price fixing activities of the corrugated container industry. That in-

vestigation culminated in indictments of fourteen companies and twenty-six individuals.[1]

Following the criminal indictments, numerous civil antitrust actions were filed in various district courts under the Sherman and Clayton Acts, 15 U.S.C. §§1, 2, 15 (1976). These lawsuits were consolidated by the Judicial Panel on Multidistrict Litigation and assigned to Chief Judge John V. Singleton, Jr. of the Southern District of Texas. Petitioners here are purchasers of corrugated containers who opted-out of the class action (hereinafter "opt-outs").[2]

On January 10, 1978, Conboy submitted to an interview by Department of Justice attorneys in which he was questioned extensively concerning his participation in and knowledge of the corrugated container price fixing conspiracy. That interview was conducted pursuant to a Department of Justice letter promise of immunity. The letter stated that:

> "The information which you reveal in the course of the interview and the transcript derived therefrom, along with the personal documents which you deliver to us, will be given the same treatment and protections afforded statements made before a grand jury pursuant to a court order compelling testimony and granting immunity."

Subsequently, on January 16, 1978, Conboy appeared before the grand jury, and, pursuant to 18 U.S.C. §6001 *et seq.* (1976), was granted formal use immunity for his testimony. Conboy then testified before the grand jury, restating and expanding his interview testimony re-

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[1] Most indicted companies and individuals pled *nolo contendere*. Two corporations and several individuals went to trial and were acquitted.

[2] All defendants but one in the class case settled prior to or during trial. Defendant Mead Company was found guilty by jury verdict in the class case.

garding price fixing conversations with competitors. Conboy was not indicted. Further, the Department of Justice indicated that no unindicted witness who had testified under a grant of immunity would be prosecuted for his participation in or knowledge of the corrugated container price fixing conspiracy.[3]

Transcripts of Conboy's immunized interview statement and grand jury testimony were produced to plaintiffs and defendants pursuant to an order of Judge Singleton, dated January 25, 1980, on a showing of "compelling and particularized need". Memorandum and Order of January 25, 1980.

Pursuant to a subpoena issued by the United States District Court for the Northern District of Illinois, Conboy appeared with counsel for a deposition by opt-outs on May 20, 1981. Counsel for opt-outs, Conboy himself, and counsel for Conboy had copies of the immunized testimony at the deposition. Conboy initially testified as to the dates and general nature of his employment with Weyerhaeuser. Conboy was then asked to confirm that he had testified at the Justice Department interview and before the grand jury, to identify as "true and correct" transcripts of his inverview and grand jury testimony, and to verify that his responses at the interview and before the grand jury had been true and correct. He refused to answer each question, claiming a Fifth Amendment privilege against self-incrimination. Conboy

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[3] In a letter to counsel for Mead in the class litigation, Richard Favretto of the Justice Department, lead attorney in the criminal investigation, stated that: "No witness in this litigation who has received prior immunity from the federal government, or who was prosecuted in the criminal actions, need fear additional prosecution by the Department of Justice for a violation of federal antitrust laws encompassed by the earlier criminal cases arising out of his or her activities in connection with the corrugated container industry before January 25, 1978."

was next asked questions taken verbatim from, or closely tracking transcripts of his immunized testimony. Again, he refused to answer, asserting the Fifth Amendment privilege.[4]

Counsel for opt-outs then telephoned Judge Singleton and moved him to compel Conboy to answer the questions. After hearing argument of counsel for both sides and personally questioning Conboy, Judge Singleton, expressly invoking his authority to exercise the powers of the District Court for the Northern District of Illinois pursuant to 28 U.S.C. §1407(b) (1976), ordered Conboy to answer the questions. When Conboy continued to claim a Fifth Amendment privilege, the Judge held him in contempt of court, but stayed the operation of the order pending appeal.

An expedited appeal followed under the provisions of the recalcitrant witness statute, 28 U.S.C. §1826.[5] The panel majority (Senior Judge Swygert and Chief Judge

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[4] The interrogation fell into the following pattern: a question was asked from the transcript; then it was rephrased to include the transcript answer (i.e., '[i]s it not the fact that . . .'); finally, Conboy would be asked if he had 'so testified' in his interview statement. Examples of this three-question pattern are as follows:

> Q. Who did you have price communications with at Alton Box Board?
>
> . . . . .
>
> Q. Is it not the fact that you had price communications with Fred Renshaw and Dick Hermans . . . at Alton Box Board?
>
> . . . . .
>
> Q. Did you not so testify in your government interview statement of January 10, 1978? Tr., 20. 20-21, 22.

[5] 28 U.S.C. §1826(b) (1976) provides, in pertinent part, that "[a]ny appeal from an order of confinement under this section [recalcitrant witnesses] shall be disposed of as soon as practicable but not later than thirty days from the filing of such appeal." Conboy's appeal was docketed with the Court below on June 17, 1981. The panel majority decision was rendered July 17, 1981.

Cummings) affirmed the order of contempt, holding that "because the questions asked in this deposition were taken verbatim from or closely tracked the transcript of Conboy's grand jury testimony, we believe the answers at the deposition would be 'derived from' the prior immunized testimony and therefore would be unavailable for use in any subsequent criminal prosecution." *In Re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, No. 81-1960, Slip Op. at 35a (7th Cir., July 17, 1981) *rev'd on rehearing en banc*, No. 81-1960 (7th Cir., October 16, 1981) (hereinafter "Panel Op."). Judge Sprecher dissented.

Conboy petitioned for rehearing *en banc*. On September 2, 1981 the petition was granted.[6] In a four to one opinion, the Court of Appeals adopted and republished Judge Sprecher's opinion dissenting from the panel decision as the *en banc* majority opinion. *In Re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, No. 81-1960 (7th Cir., October 16, 1981) (hereinafter "*En banc* Op.")

The *en banc* majority held that the use immunity statute affords no protection for Conboy's civil deposition testimony, and that such testimony constitutes a new and independent source of evidence which could be used against him in a subsequent criminal prosecution. Chief Judge Cummings, in a separate dissenting opinion, characterized the *en banc* majority's construction of the immunity statute as "unduly restrictive" and as affording only "parlous and nugatory protection." *En banc* Op. at 27a, 29a.

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[6] Judge Swygert did not participate in the order granting rehearing *en banc*, or the subsequent *en banc* opinion. Judge Cudahy disqualified himself from participation in the petition for rehearing and the rehearing.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below, and the decision of the Fifth Circuit in *In Re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086 (5th Cir., 1980), directly conflict with the decision of the Second Circuit in *In Re Corrugated Container Antitrust Litigation, Appeal of Philip Fleischacker*, 644 F.2d 70 (2d Cir., 1981), and the decisions of the Eighth Circuit in *In Re Order of Civil Contempt, Appeal of Carlos Lee Starkey*, 600 F.2d 1043 (8th Cir., 1979), and *Little Rock School District v. Borden, Inc.*, 632 F.2d 700 (8th Cir., 1980). Indeed, the *en banc* majority so acknowledged:

> There is a conflict of opinion among the circuits on this question. In *Franey*, the Fifth Circuit held that answers to verbatim questions from prior immunized testimony were not protected by the original immunity grant. But in [*Fleischacker* and *Starkey*], the Second and Eighth Circuits held that such answers were protected. *En banc* Op. at 15a.

The conflict among the Circuits is profound. The Eighth Circuit in *Starkey* was the first to consider the question. That Court held that as long as the deposition questions were confined to "the same time, geographic and substantive framework as the [immunized] grand jury testimony" the witness was protected and, therefore, could not properly invoke the Fifth Amendment. 600 F.2d at 1048. The Court stated that the deponent "clearly has immunity from criminal prosecution for the [civil] deposition testimony because such testimony would be tainted by the Federal grand jury testimony for which [he] received 'use' immunity pur-

suant to 18 U.S.C. §6001 *et seq.*" *Id.* at 1046. *Accord, Little Rock School District v. Borden, Inc.*, 632 F.2d 700 (8th Cir., 1980) ("the immunization of their testimony before the . . . grand jury protects them from any subsequent prosecution, State or Federal, in which direct or indirect use of this testimony is made").

The Fifth Circuit in *Franey* considered the question next. In a two to one decision the Court reached the opposite result. The panel majority held that the district court's (Singleton, J.) determination that the civil deposition testimony would be "derived" from immunized testimony and, therefore, "tainted" and inadmissible in any future prosecution, amounted to an impermissible judicial grant of immunity, contrary to 18 U.S.C. §6003 (1976). The majority further reasoned that the district judge lacked authority to prospectively determine that the civil deposition testimony would be barred as derived information. In a vigorous dissent, Judge Frank M. Johnson observed:

> There is no question but that the majority opinion is correct that it is beyond the authority of a district judge unilaterally to grant immunity to compel deposition testimony. See 18 U.S.C. §6003 [citations omitted]. However, a grant of immunity under 18 U.S.C. §6001 *et seq.* such as that received by appellants for their grand jury testimony covers any information 'directly or indirectly' derived from the immunized testimony.
>
> * * *
>
> It is my judgment that any prosecutorial use of the deposition testimony required by the district judge would, without any question, be barred as derivative of the compelled evidence. 620 F.2d at 1095.

Judge Johnson added that it has always been the province of the judiciary to determine the scope of protection provided by immunity statutes and to deter-

mine whether an assertion of the Fifth Amendment privilege is proper. He noted that a prospective determination had been made by the Seventh Circuit in *Patrick v. United States*, 524 F.2d 1109, 1120 (7th Cir., 1975) (Stevens, J.).

Within several months of *Franey*, the Second Circuit handed down its decision in *Fleischacker*. In the very same case, an opposite result was reached.[7] The *Fleischacker* Court held; "[w]e agree with the Eighth Circuit and hold that where a transcript of a witness' immunized testimony constitutes the source of questions posed to the same witness in a civil proceeding, responsive answers to such questions are necessarily 'derived from' the immunized testimony, and thus unavailable for subsequent prosecutorial use." 644 F.2d at 77. The Second Circuit explicitly rejected the Fifth Circuit's reasoning in *Franey*, embracing instead Judge Frank Johnson's dissent:

> We cannot agree with the Fifth Circuit's formulation. As Judge Johnson observed in his dissent, Courts traditionally have ruled upon the correctness of invoking the privilege and thus the propriety of compelling a witness to testify over its assertion. See *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 815, 818, 95 L.Ed. 1118 (1951); *Rogers v. United States*, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951). In deciding whether to uphold a witness' assertion of the self-incrimination privilege in cases such as this, the district judge need only determine whether prior immunized testimony has served as the source of the questions being asked. If so, any

[7] The Fifth Circuit in *Franey* rejected jurisdiction over Fleischacker's appeal, returning his case to the Second Circuit, where his deposition had taken place. 620 F.2d at 1090-91.

> responsive answer by the witness to such questions necessarily will 'derive from' the immunized testimony and thus be unavailable for future use against the witness in a criminal prosecution. 644 F.2d at 78.

This, then, was the state of the conflict before *Conboy*. *Conboy* succeeded only in exacerbating the problem. First, the panel majority, relying on the Second Circuit decision in *Fleischacker* and the Eighth Circuit decision in *Starkey*, held Conboy's civil deposition testimony protected from use against him. Senior Judge Luther Swygert, writing for the majority, stated:

> Because the questions asked in this deposition were taken verbatim from or closely tracked the transcript of Conboy's grand jury testimony, we believe that his answers at the deposition would be 'derived from' the prior immunized testimony and therefore would be unavailable for use in any subsequent criminal prosecution. Panel Op. at 35a.

Judge Sprecher, dissenting, urged that while the questions would necessarily be derived, the answers, would not:

> The answers, unlike the questions, are not 'directly or indirectly derived' from the immunized grand jury transcripts. Rather the answers are derived from the deponent's *current*, independent memory of events.
>
> * * *
>
> If Conboy answers the proposed questions, those answers necessarily create a *new* source of evidence. The new answers could then be used by a prosecutor because those specific answers were not derived from the previously immunized testimony—even though the questions, of course, were so derived. Panel Op. at 58a-59a.

Then, with the rehearing *en banc*, Judge Sprecher's panel dissenting opinion became the *en banc* majority

opinion. Chief Judge Cummings, writing a separate dissenting opinion, observed that the *en banc* majority's "question/answer" distinction was "an arid distinction; it rests on an unduly restrictive reading of the statutory language and on a misconception about the effect of repetition of testimony." *En banc* Op. at 27a. Judge Cummings explained in his dissent the rationale of the panel majority:

> The panel majority would have treated Mr. Conboy's answers as falling within the category of 'information directly or indirectly derived' from his immune testimony, where the questions were asked so as to afford Mr. Conboy the choice of (1) repeating his original immunized answer, (2) adopting his immunized answer when it was repeated to him, or (3) affirming that the transcript of his immunized answer was his prior testimony. *En banc* Op. at 28a.

Judge Cummings chided the *en banc* majority for citing factually inapposite cases, while ignoring the different result suggested in *Patrick v. United States*, 524 F.2d 1109 (7th Cir., 1975).[8]

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[8] Judge Cummings found that, in *Patrick*, the "Internal Revenue Service had approved a jeopardy assessment against the taxpayer based on his immunized grand jury testimony about his gambling activities and income. The taxpayer argued that forcing him to resort to a refund suit would burden his Fifth Amendment rights. He would be put to a Hobson's Choice: he must either repeat his grand jury testimony and lose his immunity or forego his refund claim. Judge Stevens' answer to Mr. Patrick's plight applies equally to Mr. Conboy's: "[O]n the facts alleged by Patrick, such later testimony would be elicited only because the government could use the grand jury testimony as a basis for the assessment. Thus, any testimony elicited in the tax proceeding would be 'information . . . indirectly derived from . . . testimony' compelled under the original immunity grant and thus could not be used against Patrick in any criminal proceeding." 524 F.2d at 1120." *En banc* Op. at 29a.

In short, two Circuits (Eighth and Second) and eleven judges (Lay, Heaney, McMillan, Gibson, Stephenson, Mulligan, Meskill, Holden, Johnson, Swygert, Cummings) hold that civil deposition testimony taken verbatim from, or closely tracking prior immunized Grand Jury testimony, is protected from use against the deponent in subsequent criminal prosecution, while two Circuits (Fifth and Seventh) and six judges (Tjoflat, Fay, Sprecher, Pell, Bauer, Wood) hold that such testimony is not protected from subsequent use.

The conflict is particularly unseemly since contrary results have been reached in the very same litigation, i.e. *Fleischacker*, *Franey* and *Conboy*.[9] Because of the application of 28 U.S.C. §1407(b), wherein Judge Singleton, in compelling deposition testimony over Fifth Amendment claims, was exercising the powers of a district judge in the district where the deposition was being taken, the conflict in circuits has resulted in inconsistent decisions in the same litigation. Thus, Fleischacker's contempt order was upheld, while Franey's, and now Conboy's contempt orders were reversed.

II.

The holding of the *en banc* majority conflicts in principle with this Court's opinion in *Kastigar v. United States*, 406 U.S. 441 (1972). In upholding the constitutionality of the use immunity statute, this Court in *Kastigar* held that the Fifth Amendment privilege may

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[9] In this same litigation, the District of Columbia Circuit, in *In Re Corrugated Container Antitrust Litigation, John W. Culy, Appellant*, No. 81-1443 (D.C. Cir., August 28, 1981) recognized the division in the Circuits but did not reach the question at issue here. *Culy* Slip Op. at 22-23.

be supplanted, and a witness ordered to testify, by a grant of immunity that is co-extensive with the privilege because "the grant of immunity has removed the dangers against which the privilege protects", *Id.* at 449. This Court was satisfied that the language of §6002 provided such broad and co-extensive protection:

> The statute's explicit proscription of the use in any criminal case of "testimony of other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. *Id.* at 453.

This Court added that the statute places a very high "affirmative duty" upon the prosecution "to prove that the evidence . . . is derived from a legitimate source *wholly independent* of the compelled testimony", *Id.* at 460. (emphasis added)

The Second Circuit in *Fleischacker* relied upon the *Kastigar* holding that the use immunity statute provides "a sweeping proscription of use, direct or indirect, of the compelled testimony" 406 U.S. at 460, and is "a comprehensive safeguard" 406 U.S. at 460, to find that a prosecutor could not use civil deposition testimony taken verbatim from or closely tracking prior immunized testimony. Thus it held:

> To permit use of such laundered testimony would violate the constitutional requirement that a witness' compelled testimony "can in no way lead to the infliction of criminal penalties." *Kastigar v. United States*, 406 U.S. at 461. 644 F.2d at 76.

See also, Panel Op. at 35a-41a.

The Conboy *en banc* majority did not interpret the immunity statute consistently with *Kastigar*. The *en banc* majority read out of the statute the prohibition on use of information derived from immunized testimony by rul-

ing that deposition testimony taken verbatim from immunized testimony is not derivative information, and, therefore can be used against the deponent. As Judge Cummings observed in his dissent, "the method of the *en banc* majority is first to read the use immunity statute to afford only parlous and nugatory protection and then, of necessity, to find such protection an inadequate substitute for Fifth Amendment rights." *En banc* Op. at 29a. The *en banc* majority's narrow reading of the scope of protection afforded by the use immunity statute conflicts with the broad and comprehensive protection mandated by *Kastigar*.

III.

The decision below and the conflicts both among and within the Circuits warrants the exercise of this Court's supervisory power. In addition, the decision below raises important constitutional and statutory questions concerning a witness' right to assert the Fifth Amendment privilege and the scope of protection afforded by the use immunity statute. This Court has determined that use of the immunity statute and its application rises to the level of a fundamental constitutional privilege. Because of the unduly narrow construction given the *Kastigar* decision by the court below, and contrary construction given it by the Second and Eighth Circuits, an untenable circumstance has arisen whereby a fundamental constitutional privilege differs depending upon the jurisdiction in which the individual resides.

Further, the *en banc* decision severely impinges on the ability of civil litigants in private antitrust actions to obtain merit testimony over Fifth Amendment assertions. Should this Court determine, as did the Second and Eighth Circuits, that such testimony is protected by the

use immunity statute as construed by *Kastigar*, the witness will be in the exact same position as if he asserted the Fifth Amendment, while necessary discovery will be provided to the litigants. If not resolved in this litigation, the question will certainly arise in later litigation, where, due to the nature of the conflict, the parties will inevitably seek the forums most favorable to their respective positions.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANCIS J. McCONNELL
135 S. LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131

Attorney for Petitioners

Appendix

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1960

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION.

APPEAL OF: JOHN CONBOY,

Deponent.

Appeal from the United States District Court for the Southern District of Texas, Houston Division.
No. MDL 310—John V. Singleton, *Judge.*

ARGUED EN BANC SEPTEMBER 10, 1981
DECIDED OCTOBER 16, 1981

Before CUMMINGS, *Chief Judge*, PELL, SPRECHER, BAUER and WOOD, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This is an appeal from an order holding a non-party deponent in civil contempt for asserting the Fifth Amendment in response to questions read verbatim from or closely tracking transcripts of the deponent's previously immunized testimony. The district court ordered the deponent to answer the questions, apparently on the ground that he would not be subject to future criminal prosecution based on this testimony. For the reasons stated herein, we reverse the judgment of the district court.

I

John A. Conboy is a former executive of the Weyerhaeuser Company. He was one of numerous immunized grand jury witnesses in an investigation

leading up to the indictments of fourteen companies and twenty-six individuals for a nationwide conspiracy to fix prices in the corrugated container industry. Relying on a promise of immunity from the Justice Department, Conboy submitted to an interview by Justice Department attorneys who questioned him extensively concerning his participation in and knowledge of alleged price communications and agreements among suppliers in the corrugated container industry. Subsequently, Conboy testified before a grand jury regarding these issues, having received a separate and independent grant of use immunity.

Following the conclusion of the criminal trial, numerous civil actions were brought against the major corrugated container manufacturers, including Weyerhaeuser. These civil cases were consolidated in *In Re Corrugated Container Antitrust Litigation*, MDL 310 (S.D.Tex.). In this litigation, class action plaintiffs either tried or settled their claims. The class trial and many of the class settlements are the subject of pending appeals. Eighteen "opt-out" cases remain pending before the district court. The opt-out plaintiffs allege, among other things, that the defendants were engaged in, and fraudulently concealed, an ongoing price-fixing conspiracy in the corrugated container industry through 1978.

The opt-out plaintiffs subpoenaed several previously immunized grand jury witnesses, including Conboy, for deposition testimony and production of documents. On May 20, 1981, Conboy appeared with counsel in Chicago for deposition pursuant to a subpoena. At his deposition, Conboy initially testified as to the dates and general nature of his employment with Weyerhaeuser. He was then asked: to confirm that he had testified at the Justice Department interview and the grand jury; to identify as "true and correct" a transcript of his interview and of his grand jury testimony;[1] and whether his

[1] The parties do not dispute that the plaintiffs received copies of the transcripts of the Justice Department interview and the grand jury testimony. In this appeal, the parties do

(Footnote continued on following page)

responses at the interview and before the grand jury had been true and correct. Conboy refused to answer these and other questions pertaining to his interview and grand jury testimony on the basis of the Fifth Amendment privilege against self-incrimination.[2] He

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[1] *continued*
not state how these transcripts were made available to them. In *In re Corrugated Container Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086 (5th Cir. 1980), involving an appeal from the same multi-district litigation by other witnesses for refusals to answer deposition questions regarding previous grand jury testimony, the transcript had been made available to the plaintiffs by court order, which was appealed. 620 F.2d at 1089 n.2. Here, Conboy does not challenge the provision of transcripts to plaintiffs and we express no opinion as to the propriety of that action.

[2] The balance of the deposition consisted of questions previously asked at the Department of Justice interview concerning Conboy's alleged involvement in price fixing activities during his tenure as Regional Marketing Coordinator for Weyerhaeuser's Central Region in Worthington, Ohio. The interrogation fell into the following pattern: a question was asked from the transcript; then it was rephrased to include the transcript answer (i.e., "[i]s it not the fact that. . . ."); finally, Conboy would be asked if he had "so testified" in his interview statement. Examples of this three-question pattern are as follows:

> Q: Who did you have price communications with at Alton Box Board?
>
> . . . .
>
> Q: Is it not the fact that you had price communications with Fred Renshaw and Dick Hermans . . . at Alton Box Board?
>
> . . . .
>
> Q: Did you not so testify in your government interview statement of January 10, 1978?

Tr., 20, 20-21, 22.

> Q: Would your prices be at or above his prices, referring to Alton's prices?
>
> . . . .
>
> Q: Is it not the fact that you would price slightly above or slightly below the Alton prices?
>
> . . . .

(Footnote continued on following page)

did acknowledge that any testimony which he may have provided was given pursuant to prior grants of immunity. Conboy's counsel advised the plaintiffs' counsel that Conboy would invoke his Fifth Amendment privilege in response to all further questions concerning pricing activities during his tenure as Weyerhaeuser's Regional Marketing Coordinator in Worthington, Ohio.

The plaintiffs' counsel then suspended the deposition and telephoned the judge presiding over the multi-district litigation. The judge was informed of the relevant facts regarding Conboy's employment with Weyerhaeuser and that Ohio had no statute of limitations for antitrust actions.[3] Conboy's counsel argued that, even though the prior testimony had been immunized, new answers to those questions, or even new answers confirming that the previous answers had been made could tend to incriminate Conboy.

The district court judge advised the parties that he was empowered to sit as a district judge in Illinois under 28 U.S.C. § 1407,[4] and began to question Conboy regarding his employment history in Ohio and his

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[2] *continued*

Q: And did you not so testify in your government interview statement?

Tr., 31, 32.

[3] Ohio's criminal antitrust statute states in pertinent part:

No Statute of Limitation shall prevent or be a bar to any suit or proceeding for any violation of Section 1331.01 to 1331.14, inclusive, of the Revised Code.

Ohio Rev. Code Ann. § 1331.12. The constitutionality of this statute has been upheld in *Ohio ex rel. Brown v. Klosterman French Baking Co.*, 1977-1 Trade Cases (CCH ¶61,361 (S.D. Ohio, 1976).

[4] 28 U.S.C. § 1407(b) provides, in pertinent part, that, in multi-district litigation, judges to whom pretrial proceedings are assigned "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions . . . ." *See In re Corrugated Container Antitrust Litigation, Appeal of Phillip L. Fleischacker*, 644 F.2d 70, 76 n.6 (3d Cir. 1980).

knowledge of possible prosecution by Ohio authorities.[5] Based on Conboy's inability to establish the existence of a pending criminal investigation, the court ordered him to answer the specific questions previously asked. Conboy again refused to answer, asserting his Fifth Amendment privilege. The court found him to be in civil contempt pursuant to 28 U.S.C. § 1826, fined him $5,000, and imposed a six-month imprisonment. The court stayed execution of the order pending appeal. Conboy now appeals to this Court pursuant to 28 U.S.C. § 1826.[6]

II

There are two major issues in this appeal. The first is whether Conboy faces any risk of prosecution.[7] The sec-

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[5] This interrogation concluded with the following:

Q: Now, has anyone from the Attorney General's Office in Ohio contacted you relating to your work?
A: No.
Q: Prior to December 31, 1975?
A: No, sir.
Q: Are you a party to any lawsuit involving that work?
A: I am not.
Q: Have you been called as a witness—other than in this case—in any case arising out of Ohio?
A: No, Your Honor, I haven't.
Q: Related to the corrugated industry and your work in that industry?
A: No, sir.

Tr., 51-52.

[6] 28 U.S.C. § 1826(b) provides, in pertinent part, that "[a]ny appeal from an order of confinement under this section [recalcitrant witnesses] shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." Conboy's appeal was docketed with this Court on June 17, 1981. The parties completed their submission of briefs to this Court on July 10, 1981.

[7] A preliminary question is whether answers to the questions in issue might tend to reveal that the witness was engaged in criminal activity. *In re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086, 1091 (5th Cir. 1980). Here, there is no serious dispute that Conboy's answers might tend to reveal that he was engaged in criminal activity.

ond is, even if there is a risk of prosecution, whether a court can deny the protection of the Fifth Amendment if it concludes that the answers to the questions asked will be so "tainted" by previous grants of immunity that those answers will be inadmissible in subsequent criminal proceedings. Before reaching these two issues, however, it is important to examine the proper scope of interpretation of the Fifth Amendment's protection against self-incrimination.

The Fifth Amendment to our Constitution states that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U. S. Const. Amend. V. The plaintiffs argue that the testimonial privileges of the Fifth Amendment must be narrowly construed. Relying on *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), the plaintiffs argue that "the public is entitled to every man's evidence." Pl. Br. at 6. First, *Branzburg* is inapposite, as it held that the First Amendment created no "reporter's privilege" not available to other citizens. Second, plaintiffs failed to complete the quoted sentence in *Branzburg*. The Court carefully acknowledged limitations on the right to evidence, stating, "the longstanding principle that 'the public . . . has a right to every man's evidence,' *except for those persons protected by a constitutional, common-law, or statutory privilege*, . . . is particularly applicable to grand jury proceedings." (emphasis added) (citations and footnote omitted). Indeed, the *Branzburg* Court added, to further emphasize that it in no way envisioned any narrowing of the Fifth Amendment:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the federal constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

408 U.S. at 689-90 (footnote omitted).

The plaintiffs also rely on *United States v. Nixon*, 418 U.S. 683 (1974) as supporting their contention that a constitutional protection should be narrowly interpreted

when balanced against a private litigant's evidentiary need. But the plaintiffs' reliance on *Nixon* is also misplaced. The *Nixon* Court emphasized that the issue before it did not involve balancing a *specific* constitutional privilege against the need for evidence in *civil* litigation.[8] The Court's care in expressing what it was *not* considering suggests that even an evidentiary privilege not specifically stated in the Constitution, such as that asserted by President Nixon, should be given a high degree of deference. *Nixon* in no way derogates from the fundamental primacy of constitutional principles.

The Fifth Amendment privilege against self-incrimination is one of the core concepts of our adversary judicial system. The privilege is a shield against the dangers of an inquisitorial system of jurisprudence. As Justice Blatchford stated in *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), the Fifth Amendment privilege "must have a broad construction in favor of the right which it was intended to secure." The passage of time since *Counselman* has not seen any diminution in the need for constant vigilance by courts against the narrowing of this fundamental constitutional protection.

In view of the high place that the Fifth Amendment privilege occupies, both in our Constitution and in our judicial system, and in view of the strong traditional respect for each individual's rights that undergirds the privilege, the Court "has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against

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[8] The *Nixon* Court stated:

> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

418 U.S. at 712 n.19.

him as an accused in a criminal action." *Maness v. Meyers*, 419 U.S. 449, 462 (1975) (citations omitted). As the Court stated in *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972):

> But the power to compel testimony is not absolute. There are a number of exceptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty . . . . This Court has been zealous to safeguard the values that underlie the privilege.

(footnotes omitted). *See Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55 (1964) ("The Fifth Amendment privilege reflects many of our fundamental values and most noble aspirations . . . ."); *Ullman v. United States*, 350 U.S. 422, 426, 426-29 (1956) ("Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit.") (Frankfurter, J.); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (privilege must be accorded liberal construction); and *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920) (privilege must be accorded broad construction).

III

Cognizant of the need for a liberal construction of the fundamental Fifth Amendment privilege against self-incrimination, we now consider whether Conboy faced any risk of prosecution. The district court concluded, first, that Conboy could not face federal charges because the applicable five-year statute of limitations had run. Second, the district court seemed to conclude that Conboy would not face any charges in Ohio because Conboy admitted he did not know of any litigation related to the

corrugated industry in the state of Ohio.[9] But the court's reasoning is erroneous for several reasons.

A

First, and most fundamental, as this court recently held, the protection of the Fifth Amendment applies so long as there is a *possibility* of prosecution, regardless of a judge's assessment of the likelihood of prosecution. *In re Folding Carton Antitrust Litigation, Appeal of R. Harper Brown*, 609 F.2d 867 (7th Cir. 1979). We concluded in *Brown*:

> Short of the existence of one of these indicia [*viz.*, statute of limitations, immunity, double jeopardy] of an *absolute bar* to subsequent prosecution, a judge's prediction as to the likelihood of a prosecutor filing an indictment is not dispositive in ascertaining the permissible scope of a claim of Fifth Amendment privilege.

609 F.2d at 872 (footnotes omitted) (emphasis added).

This court's decision in *Brown* was relied upon by the Fifth Circuit Court of Appeals in an appeal from the same multi-district litigation on the identical substantive issue as the present case. *In re Corrugated Con-*

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[9] The district court's order provided, in part, as follows:

> The federal statute of limitations is four [sic] years which indicates that Mr. Conboy would not be subject to federal prosecution for the period before December 31, 1975. Counsel for John A. Conboy stated that Mr. Conboy may be subject to prosecution in Ohio where there exists no applicable statute of limitations for antitrust violation. The Court questioned Mr. Conboy as to whether he knew of any pending litigation related to the corrugated industry in the state of Ohio. Mr. Conboy answered that he has not been contacted to testify nor does he know of any such litigation in Ohio. Counsel for John A. Conboy did not present proof that any other applicable statute of limitations had not run.

In re Corrugated Container Antitrust Litigation, Order Adjudging John A. Conboy To Be In Civil Contempt of Court, MDL 310, 2 (S.D.Tex. May 20, 1981).

tainer Antitrust Litigation, Appeal of Charles J. Franey, 620 F.2d 1086 (5th Cir. 1980). In *Franey*, three deposition witnesses sought review of contempt citations entered against them by the district court when they asserted their Fifth Amendment privilege in civil depositions to questions that were contained in the transcript of their prior immunized grand jury testimony. The Fifth Circuit sustained the witnesses' assertion of the Fifth Amendment privilege, because the risk that they would be prosecuted was "'more than fanciful.'" 620 F.2d at 1092, *quoting Brown*, 609 F.2d at 871. *See In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974) (witness justified in refusing to answer unless the only danger is imaginary); *United States v. Johnson*, 488 F.2d 1206, 1209 n.2 (1st Cir. 1973) ("neither the practical unlikelihood of further prosecution, nor the Assistant United States Attorney's denial of an intention to charge conspiracy, negated [the defendant's] privilege"); and *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958) (no justification for limiting the Fifth Amendment privilege whenever it appears the government would not undertake to prosecute).

The "absolute bar" test recognizes that, to the extent any doubt exists regarding the validity of the claimed Fifth Amendment privilege, the benefit of that doubt must go to the witness asserting the privilege. The determination whether to prosecute is exclusively within prosecutorial discretion. The validity of the privilege cannot be grounded on a district court's prediction of the likelihood of prosecution because the past and present behavior of prosecutorial authorities is not a sufficiently accurate indication of the risk of criminal prosecution. *See Miranti*, 253 F.2d at 139.[10]

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[10] The *Miranti* court stated:

> We find no justification for limiting the historic protections of the Fifth Amendment by creating an exception to the general rule which would nullify the privilege whenever it appears that the government would not undertake to prosecute. Such a rule would require the trial court, in each case, to assess the practical possibility

(Footnote continued on following page)

Not only must the benefit of the doubt go to the witness claiming Fifth Amendment privilege, but also the burden of proof as to any prosecution must not be improperly shifted to the witness. As the Court stated in *Hoffman*, the witness must not be required to prove the possibility of prosecution "in the sense in which a claim is usually required to be established in court." 341 U.S. at 486. Here, the trial court seemed to base its contempt order, in part, on Conboy's failure to prove the existence of an impending criminal prosecution against him. *See* note 9, *supra*. This basis for the contempt order is clearly incorrect. So long as there is any basis for a prosecution, the Fifth Amendment protection applies.

B

The district court erred in concluding that Conboy could not face federal charges for his activities prior to December 31, 1975. Although the statutes of limitations have run for the antitrust charges, the plaintiffs admit that the federal statute of limitations for conspiracy does not begin to run until a defendant's last act in furtherance of the conspiracy. Unless an individual can show withdrawal from the conspiracy by an affirmative act designed to defeat the purpose of the conspiracy, that defendant remains liable for all acts committed by co-conspirators until the conclusion of the conspiracy. *See United States v. Fitzgerald*, 579 F.2d 1014 (7th Cir.), *cert. denied*, 439 U.S. 1002 (1978) (prosecution of defendants not barred by statute of limitations even though they ceased active participation in the conspiracy seven years before the indictment). Conboy must harbor a reasonable fear of prosecution for federal antitrust conspiracy until 1983.

The plaintiffs argue that Conboy is not "really" subject to federal prosecution because a Justice Department at-

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[10] *continued*

that prosecution would result from incriminating answers. Such assessment is impossible to make because it depends on the discretion exercised by a United States Attorney or his successor.

253 F.2d at 139 (footnotes omitted).

torney, in a letter to another defendant in the corrugated container civil litigation stated that the Justice Department had no intention to prosecute any previously immunized witness in the corrugated container litigation. But this is a slender reed indeed on which to deny the fundamental constitutional protection afforded by the Fifth Amendment privilege. Plaintiffs cite no law stating that the Justice Department letter is binding on the Justice Department with regard to Conboy. *See Miranti*, 253 F.2d at 139, quoted at note 10 *supra*. The key point, which plaintiffs concede, is that notwithstanding the Justice Department letter, Conboy *does* remain liable to subsequent federal prosecution.

Even if we assume—and we do not—that the Justice Department is somehow bound by a letter of one of its attorneys, it is undisputed that Conboy is subject to state antitrust charges in Ohio. Plaintiffs suggest, however, that the possibility of such prosecution is "fanciful", and that Conboy could successfully plead laches as a defense.

Plaintiffs' counsel ask us to determine, as a matter of law, that the possibility of an Ohio action against Conboy is fanciful merely because, to date, Ohio has not instituted any action of the corrugated container industry of which plaintiffs' counsel are aware. But Fifth Amendment protections should not be eviscerated merely on plaintiffs' counsel's assurances that they do not happen to know of any Ohio investigation of the corrugated container industry. Indeed, the lack of foundation for such assurances is seen in the admission of one of plaintiffs' counsel, at oral argument before this Court, that he did not know that, as indicated in *Franey*, 620 F.2d at 1092, a federal grand jury sitting in Ohio had begun its own investigation of the corrugated container industry. If counsel did not know of this federal grand jury, they very well also might not know of a state grand jury, should one be sitting.[11] This example demonstrates that

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[11] In a letter after oral argument, plaintiffs' counsel stated:

> In the course of the oral argument in the case of *In Re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, there was a question concerning whether a fed-

(Footnote continued on following page)

constitutional protections should not be based on adversaries', or even on witnesses' knowledge of potential prosecutorial activities.

Plaintiffs respond by arguing that, even if Conboy should be prosecuted in Ohio, he would be able to invoke laches as a complete defense. For this unusual assertion, they rely on *Ohio ex rel. Brown v. Klosterman French Bakery Co.*, 1977-1 Trade Cases (CCH) ¶61,361 (S.D. Ohio 1976). First, as will be discussed, whether or not Conboy may utilize certain defenses in a subsequent criminal prosecution has no bearing on the legitimacy of his Fifth Amendment claim in the proceeding at issue. Second, *Klosterman*, a civil decision by a federal, not an Ohio, court in ruling on a motion for summary judgment specifically stated that it was not "ruling upon the applicability of the doctrine of laches in the context of this lawsuit." ¶61,361 at 71,274. Moreover, the *Klosterman* discussion of laches was based upon a quotation from *Gardner v. Panama R. R. Co.*, 342 U.S. 29, 30-31 (1951), which stated that laches was a question primarily addressed to the discretion of the trial court. Indeed, the *Gardner* Court held that laches was *not* a defense to the *civil* suit there in issue. Plaintiffs present no Ohio nor any other authority establishing that laches would

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11 *continued*

eral grand jury was impaneled in Ohio to investigate the corrugated container industry. As I expressed to the Panel, it was my understanding that no such investigation was under way. To make certain that my representations to the Court were correct, Mr. Polster of the Justice Department, Antitrust Division, Cleveland Branch, was contacted concerning this matter. Mr. Polster confirmed the accuracy of my representation to this Court by stating that he was aware of no such grand jury investigation pending at this time. Moreover, Mr. McShane of the Ohio Attorney General's Office, Antitrust Division, has stated that his office has no knowledge of any Ohio antitrust criminal investigation into the corrugated container industry.

necessarily be a successful defense to an Ohio prosecution of Conboy.[12]

Even given the possibility of a speculative laches defense, there is no dispute that Conboy remains subject to prosecution in Ohio. But plaintiffs argue that demonstrating this liability somehow "proves too much" because in Ohio antitrust actions are not subject to a statute of limitations. Ohio Rev. Code Ann. § 1331.12. We do not see how this long-term liability "proves too much." The Fifth Amendment stands between a defendant and *any* possible prosecution. If the prosecution may be threatened over a long time, surely it does not "prove too much" to conclude that the Fifth Amendment protection must also exist for a long time. Otherwise, prosecutors could defeat the Fifth Amendment's protection by waiting to bring actions. Thus, the "proves too much" argument must fall.

In summary, despite the assurances of the plaintiffs to the contrary, Conboy might be prosecuted by both federal and state authorities. As we stated in *Brown*, so long as there is *any* possibility of prosecution, the Fifth Amendment privilege must apply. Whether Conboy actually would be prosecuted, we cannot predict and, therefore, is irrelevant. Any doubt as to the likelihood of

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[12] Plaintiffs suggest that Ohio Rev. Code § 1331.13 would prevent a prosecution of Conboy. Ohio Rev. Code § 1331.13 provides, in pertinent part, as follows:

> If a court of record . . . in which is pending a civil or criminal action . . . so orders, no person shall be excused from attending, testifying, or producing books . . . or other documents . . . for the reason that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty. No person may be prosecuted or subjected to a penalty for or on account of a transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, before such court, person, or officer.

This statute merely prohibits later prosecution of a witness required to testify *for the required testimony* in the same proceeding. Here, Conboy's testimony would not be ordered under the Ohio statute and, therefore, this statute would not prevent his prosecution.

possible prosecution must be resolved in favor of the witness.

IV

The next major question is whether a court can deny the protection of the Fifth Amendment privilege if it concludes that the answers to the questions asked will be so "tainted" by previous grants of immunity that those answers will be inadmissible in subsequent criminal proceedings. It is undisputed that, because his statements were made under grants of immunity, the transcripts of Conboy's Justice Department interview and grand jury testimony could not be used against him. But now, we must consider whether *new* answers to questions based on the earlier immunized testimony are, as a matter of law, *necessarily* themselves immunized.

There is a conflict of opinion among the circuits on this question. In *Franey*, the Fifth Circuit held that answers to verbatim questions from prior immunized testimony were not protected by the original immunity grant. But in *In re Corrugated Container Antitrust Litigation, Appeal of Phillip Fleischacker*, 644 F.2d 70 (2d Cir. 1981), and in *In re Order of Civil Contempt, Appeal of Carlos Lee Starkey*, 600 F.2d 1043 (8th Cir. 1979), the Second and Eighth Circuits held that such answers were protected.

In our opinion, the better reasoning is found in the *Franey* decision. Also, for other reasons, we conclude that the district court's conclusion that Conboy's testimony could never be used against him in subsequent proceedings was erroneous.

A

It is important to distinguish, at the outset of this discussion, two different concepts. The first is the court's remedial power to exclude evidence which violates the Fifth Amendment. The second is the scope of the protection afforded by a grant of statutory immunity—aside from any later effort to remedy a violation of the privilege. The basic error committed by the district

court is that it confused, and lumped together, these two concepts.

This complex issue requires precise analysis. The district court concluded that Conboy's previously granted use immunity would continue to protect him if, at a later date and in a totally separate proceeding, he repeated his deposition testimony. But this reasoning, apparently based on language in *Starkey*, 600 F.2d at 1047 (possibility of later exclusion of testimony repeating earlier, immunized testimony is all the protection afforded by 18 U.S.C. § 6001), *citing Kastigar v. United States*, 406 U.S. 441, 453 (1972), is conclusory and erroneous. The district court, and the *Starkey* court, misunderstood *Kastigar* and its precursors. This confusion can be seen by examining the nature of the concept termed "immunity".

There is no question that the Fifth Amendment privilege against self-incrimination may be asserted in a civil proceeding, at discovery or trial, whether the person to be called is a party or a witness. In certain situations, however, the privilege can be supplanted by a statutory grant of use immunity, under 18 U.S.C. § 6001 et seq., which affords protection against self-incrimination *coextensive* with the Fifth Amendment privilege. *Kastigar*, 406 U.S. at 453. As the Court emphasized, this coextensive protection protects only the *source*, not the *substance* of the information.[13] *Kastigar*

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[13] The *Kastigar* Court stated:

> The statute's [18 U.S.C. § 6002] explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore, is sufficient to compel testimony over a claim of the privilege. *While a grant of immunity must be afforded protection commensurate with that afforded by the privilege, it need not be broader.* Transactional immunity, which accords full immunity from

(Footnote continued on following page)

thus teaches that a grant of use immunity for a witness in one proceeding affords *no* protection for any self-incriminating information disclosed by the witness in other proceedings, prior or subsequent to the immunized proceeding.

Use immunity does not even shield a witness from prosecution based on the very facts and activities testified to under the grant of immunity. *See United States v. Kuehn*, 562 F.2d 427, 430, 432 (7th Cir. 1977) (defendant created independent evidence when he repeated previously immunized grand jury testimony to a reporter; court also suggested that the defendant had created independent testimony by repeating his immunized testimony as a witness in another trial) (Swygert, J.); *United States v. First Western State Bank of Minot*, 491 F.2d 780, 786 (8th Cir.), *cert. denied sub nom., Thompson v. United States*, 419 U.S. 825 (1974) ("The federal government, however, can use the same evidence testified to by defendants before the grand jury if it can demonstrate that the evidence to be used against defendants came from a legitimate source wholly independent of the compelled testimonies."); and

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[13] *continued*

prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. *The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted.*

441 U.S. at 453 (emphasis added). Later in the opinion, the Court again emphasized the limits of statutory use immunity:

> The statute, like the Fifth Amendment, grants neither pardon nor amnesty. *Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.*
>
> . . . .
>
> We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.

406 U.S. at 461-62 (emphasis added).

Miranti, 253 F.2d at 138 (witnesses' refusal, on self-incrimination grounds, to verify before grand jury statements made before a previous grand jury upheld because such verification could have been used as evidence against defendants).

As the above cases suggest, and as is stated in *Comment, Requiring Witnesses to Repeat Themselves*, 47 Tex. L.Rev. 266, 267 (1969), repetition of testimony in an independent proceeding may itself be viewed as incriminating. Thus, Conboy's deposition, even if it merely repeated or acknowledged his earlier testimony, could constitute an independent source of evidence against him.[14]

But the district court reasoned in a brief statement, that because Conboy testified earlier under immunity, he "cannot" be prosecuted for subsequent testimony based on the earlier testimony. The court, presumably relying on *Fleischacker* and *Starkey*, apparently concluded that the new deposition testimony would be inherently "tainted" by the previous grant of immunity and would thus, necessarily be inadmissible in any subsequent criminal proceeding.

B

The initial problem with the *Fleischacker* theory, that subsequent verification of previously immunized testimony is necessarily tainted, is that this theory focuses on the derivation of the deposition questions (derived from immunized testimony) rather than on the deposition answers (answered "now"). The answers, unlike the questions, are not "directly or indirectly deriv-

[14] This conclusion is buttressed by the government's policy of seeking specific grants of immunity with respect to each proceeding at which a witness testifies. *See In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618, 626 (N.D.Ill.), *rev'd. on other grounds*, 609 F.2d 867 (7th Cir. 1979). This policy was evidenced by the separate and distinct grants of immunity provided to Conboy for his initial interview testimony and then for his grand jury testimony.

ed" from the immunized grand jury or interview transcripts. Rather the answers are derived from the deponent's *current*, independent memory of events.

The misunderstanding of the nature of the answers leads to the next error in the *Fleischacker* theory, a misunderstanding of use immunity, such as given to Conboy. Both direct and indirect "use" of immunized testimony is prohibited. Direct use of previously immunized testimony would be exemplified by the introduction of that specific testimony in a subsequent proceeding. Indirect use would occur when a prosecutor has access to or is otherwise influenced by the immunized testimony and cannot prove, in a later criminal proceeding, that the evidence was derived without the aid of the immunized testimony. But neither of these concepts applies to the potential situation before us. If Conboy answers the proposed questions, those answers necessarily create a *new* source of evidence. The new answers could then be used by a prosecutor because those specific answers were not derived from the previously immunized testimony—even though the questions, of course, were so derived.[15]

C

Another major problem with the *Fleischacker* theory, that subsequent testimony based on questions from previously immunized testimony is necessarily im-

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[15] Other general considerations also mandate the conclusion that deposition testimony is independent evidence. A civil action is clearly a proceeding which is separate and distinct from a grand jury investigation or subsequent criminal trial. Because civil discovery constitutes an independent stage of litigation, testimony given in discovery would be deemed an independent source of evidence. Thus, for example, one who has freely given non-immunized grand jury testimony may nonetheless assert the Fifth Amendment privilege in subsequent proceedings. *See, e.g., United States v. Cain*, 544 F.2d 1113, 1115 (1st Cir. 1976) (Justice Clark, sitting by designation); *United States v. Johnson*, 488 F.2d 1206, 1208 (1st Cir. 1973) *citing* 8 *Wigmore on Evidence* § 2276, 470-72 (McNaughton rev. 1961; Supp. 1972).

munized, is that this theory results in improper de facto grants of immunity by courts. As the *Franey* court stated, "even if the court's finding that the witness' testimony would be 'derived' from immunized testimony were manifestly wrong, the court's order compelling the testimony would operate to immunize the testimony because of the 'well-established [exclusionary] rule' . . . ." 620 F.2d at 1093.

In a curious footnote, the *Fleischacker* court conceded the very real danger of de facto immunity. That court acknowledged that the exclusionary rule does indeed result in de facto immunity; emphasized that the exclusionary rule was solely remedial and thus could not be used to justify a denial of the Fifth Amendment's protection; and then stated that conferral of de facto immunity was unauthorized. 644 F.2d at 78 n.13.[16] But the *Fleischacker* court reasoned that no de facto immunity would occur because it was convinced that the *answers* to a subsequent deposition would necessarily "derive from" the previous immunized testimony.

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[16] The *Fleischacker* Court's discussion of this issue is as follows:

> Immunity is a creature of statute and as such can be conferred only in a manner consistent with its legislative design. . . . Section 6003 empowers the executive branch of the government to confer immunity upon a witness to compel testimony over an assertion of privilege; courts cannot confer immunity upon a witness on their own initiative. . . . *The discretion is placed in the executive branch, not in the judiciary.* . . . Nevertheless, where a "district court errs in making a rule on privilege an after-the-fact exclusionary rule will apply to prevent the introduction of that evidence against the witness." . . . *Thus, the operation of the exclusionary rule results in a de facto grant of immunity.* But [sic] *"this exclusionary rule is solely remedial and cannot be used as a rationale to support a judicial decision which contravenes the fifth amendment's protection."* . . . Though the protection afforded a witness by *de facto* immunity grants necessarily must be coextensive with grants of immunity obtained under the immunity statute, conferral of *de facto* immunity is nevertheless unauthorized.

644 F.2d at 78 n.13 (emphasis added) (citations omitted).

First, as discussed earlier, it does *not* follow that answers to subsequent testimony are necessarily "derived from" previously immunized testimony. Second, the *Fleischacker* reasoning bootstraps the critical question in issue. It assumes there will be no de facto grant of immunity because its analysis is "correct". But the critical feature of de facto immunity is that it occurs even when a court's analysis is "correct". If a court incorrectly determines that subsequent testimony was immunized, then it can and should remedy the error—i.e., the violation of the witness' Fifth Amendment privilege—through the exclusionary rule. But the key point is that, regardless of the correctness of the decision, as even the *Fleischacker* court seemed to admit in its footnote, the reliance on such a later remedy *necessarily* involves a prospective grant of improper de facto immunity.

The impropriety of such immunity is clearly explained by the court in *Ellis v. United States*, 416 F.2d 791, 796 (D.D.C. 1969):

> A trial judge cannot reject a witness's claim of privilege merely on the ground that the ruling cannot hurt the witness because it will establish an immunity from subsequent prosecution.
>
> We are not here concerned with a case where a judge has made a mistake in applying legal rules, like a case where he erroneously rules that a witness has waived his privilege. In the case before us, the judge did not purport to deny that the witness had correctly presented a claim of privilege. He merely asserted that the witness would nevertheless be protected, by *Murphy*, against prosecution based on his testimony.
>
> The ruling was made by an able and conscientious trial judge. We are confident it was made in good faith, and can even discern how the judge may have come to a mis-reading of *Murphy*. *Nevertheless, his ruling was in the nature of a circular, self-fulfilling prophecy that in substance can only be viewed as a grant of immunity. That ruling was outside the scope of judicial authority.*

(emphasis added). *See In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618, 628 (N.D.Ill. 1979), *rev'd on other grounds, Brown*, 609 F.2d 867. In denying Conboy's Fifth Amendment claims the district court made a prospective determination that Conboy's future deposition testimony would necessarily be tainted, and thus compelled his deposition testimony. This is precisely what a court cannot do. *Brown*, 609 F.2d at 872 n.11; *Ellis*, 416 F.2d at 796; *In re Folding Carton Antitrust Litigation*, 465 F.Supp. at 628.

To let stand the district court's order regarding Conboy's Fifth Amendment claims would improperly extend the power of the judiciary beyond its intended scope. The immunity statute specifically restricts the authority to initiate an immunity order to U. S. Attorneys, with the approval of the Attorney General. 18 U.S.C. § 6003. A court has no power to issue immunity sua sponte; the power to grant immunity lies only with the Executive. *Ryan v. Commissioner*, 568 F.2d 531, 540 (7th Cir. 1978); *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1977).

The district court, by compelling Conboy's deposition, has improperly expanded the narrow *use* immunity previously afforded by the government with regard to *criminal* proceedings into an order by which *civil* plaintiffs obtain testimony for their use in a totally different judicial proceeding. Compelling Conboy's testimony here would result in conferring upon private civil litigants the power to effect a grant of broad *transactional* immunity by intentionally violating a witness' Fifth Amendment rights.[17]

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[17] As the district court stated in *Folding Carton Litigation*, 465 F.Supp. at 629, *rev'd on other grounds, Brown*, 609 F.2d 867:

> Such an expansion of the witnesses' immunity would come at the plaintiffs' request, not the government's. Plaintiffs would essentially be in the position of granting immunity which is a result inconsistent with Congress' antitrust policy . . . and with congressional policy limiting the power to authorize grants of immunity to the Executive Branch. . . . Under circumstances where the witnesses have "a reason-

(Footnote continued on following page)

D

The foregoing problems in the *Fleischacker* immunity theory lead inexorably to the next, and perhaps most fundamental, flaw in that theory. The district court, in compelling Conboy's deposition testimony, is predicting that in a future criminal prosecution of Conboy, another court will agree with the district court's determination that the deposition testimony should be excluded. But, as we recognized in *Brown*, the exclusionary rule is remedial and cannot be used as a rationale to support a judicial decision which contravenes the Fifth Amendment's protection. 609 F.2d at 872 n.11.

No government prosecutor is a party to this litigation. There is no guarantee that, in a subsequent prosecution of Conboy, another court will agree with the district court's reasoning. It is simply not possible to assume that no subsequent court could *ever* admit the deposition testimony.

In summary, the district court's order places Conboy on the horns of the following dilemma. Either all courts must be bound by the determination that Conboy's deposition is tainted, or future courts are not bound by that determination. If all courts are bound, then the district court has improperly transformed statutory use immunity into de facto judicial transactional immunity. If future courts are not bound, Conboy's Fifth Amendment rights have not been supplanted with "coextensive" protection, as required by *Kastigar*. Rather, his Fifth Amendment rights will have been stripped away based on a tenuous prediction of future events. Constitutional rights are too vital to be sacrificed to such predictions.

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[17] *continued*

able fear of prosecution," compelling the deposition testimony of these five witnesses would essentially constitute an impermissible transformation of the limited "use" immunity grant envisioned under § 6002 into a "transactional" immunity grant. . . .

(citations omitted).

V

In addition to the two broad issues of this case, whether Conboy faces any risk of prosecution and whether his deposition testimony is necessarily tainted, there are serious practical problems with ordering Conboy's deposition. First, if Conboy's answers at his deposition are even inconsistent with his earlier answers during the preliminary interview or at the grand jury interview, he could be subject to prosecution for perjury or giving false statements even without a specification in the indictment as to which answer is false. *See* 18 U.S.C. § 1623(c).

Recently, the Supreme Court has ruled that perjury prosecutions based on immunized testimony are permissible and that all statements made during the giving of immunized testimony, both true and false, may be admitted in the course of a subsequent perjury action if such use was not otherwise prohibited by the Fifth Amendment. *United States v. Apfelbaum*, 445 U.S. 115, 123 (1980). Similarly, in *United States v. Housand*, 550 F.2d 818 (2d Cir. 1977), the court held that a witness, in precisely the situation confronting Conboy here, could claim his Fifth Amendment privilege and refuse to testify a second time on matters about which he had previously given immunized testimony, since an inconsistency might give rise to a perjury or false statements prosecution.[18]

Second, Conboy faces a serious problem of waiver. He and his counsel will have the heavy burden of ensuring that he does not stray even an inch beyond the four cor-

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[18] The *Housand* court stated:

> The Fifth Amendment privilege question arises when the witness refuses to answer on the ground that his *second* version of the event may result in his prosecution for perjury . . . . [T]he giving of truthful [but inconsistent] testimony on the second occasion could surely trigger investigation of whether the original testimony was false . . . . This is a reasonable cause for apprehension and supports the claim of privilege.

550 F.2d at 823.

ners of the earlier transcripts. We realize that he and his counsel will have the transcripts before them, but emphasize that the burden of monitoring past and present testimony will be unduly onerous. For the slightest misstep—and questions may be strategically designed to induce such a misstep—could be fatal.

Moreover, it is well established that "[d]isclosure of a fact waives the privilege as to details." *Rogers v. United States*, 340 U.S. 367, 373 (1951). For example, in earlier testimony, Conboy may only have testified *that* certain price communications occurred. If he repeats this testimony in the civil deposition, he may be found, by another court, to have waived his Fifth Amendment privilege as to *details* of those communications to which he had not earlier testified. Such details may, in turn, provide investigative leads to incriminating matters totally untouched in the earlier testimony. Thus, Conboy faces very real waiver problems.

VI

Finally, the district court order compelling Conboy's testimony may be unnecessary in any event inasmuch as Conboy's grand jury testimony would in most likelihood become admissible as the result of Conboy's assertion of his privilege against self-incrimination. Rule 804 of the Federal Rules of Evidence permits former testimony to be introduced if the "declarant is unavailable as a witness" and if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

First, a witness who asserts his privilege against self-incrimination "is unavailable." *United States v. Zurosky*, 614 F.2d 779, 792 (1st Cir. 1979); *United States v. Toney*, 599 F.2d 787, 789-90 (6th Cir. 1979); *Witham v. Mabry*, 596 F.2d 293, 297 (8th Cir. 1979); *United States v. Lang*, 589 F.2d 92, 95 (2d Cir. 1978).

Second, Conboy asserts and the plaintiffs do not deny, that at least some of the parties against whom the earlier testimony could be offered have had the oppor-

tunity to develop the immunized testimony by cross-examination in the prior criminal proceeding. It may be, however, that the "opportunity for cross-examination" aspect of Fed.R.Evid. 804(a) is inapplicable, since Conboy's Fifth Amendment privilege may have prevented any opportunity for cross-examination.

The "opportunity for cross-examination" objection may not resolve this situation because it is too broad. Plaintiffs have stated that they do not intend to ask any questions beyond those asked in the earlier transcripts. It is undisputed that Conboy has, and will exercise, his Fifth Amendment privilege to refuse to answer any such questions. Defendants will not, therefore, have any real opportunity to cross-examine at the deposition. In practical terms, there is no difference between a lack of opportunity for cross-examination at the grand jury and before the Justice Department and the lack of opportunity for cross-examination at a new deposition. Thus, if the "opportunity for a cross-examination" objection would preclude admission of the prior transcripts, it would also preclude admission of the new deposition.

Although it is conceivable that the district court might not admit Conboy's grand jury testimony for some reason, in our view this risk is preferable to taking the risk that Conboy will never be prosecuted when there exists the possibility that he will be prosecuted.

VII

The critical question in this case is whether the fundamental Fifth Amendment protection against self-incrimination should be sacrificed to the plaintiffs' need for evidence in their civil litigation. The answer is that a plaintiff is only entitled to that evidence which is not otherwise protected. *Branzburg*, 408 U.S. at 688.

Recently, in *New Jersey v. Portash*, 440 U.S. 450 (1979), the Court reaffirmed the fundamental primacy of the Fifth Amendment. In *Portash*, the Court held that the Fifth Amendment prohibits the use of a witness' immunized grand jury testimony to impeach the trial testimony of that witness. Surely, if the interests of

securing justice free of the taint of perjured testimony in a criminal trial are overridden by the dictates of the Fifth Amendment, the mere denial of certain discovery to civil plaintiffs, especially when the same testimony has been secured previously, should hardly allow any curtailment of the privilege against self-incrimination. Any inconvenience to the plaintiffs must pale in the face of denial of the fundamental right against self-incrimination.

In sum, we are asked to rely on too many uncertainties. Plaintiffs assure us that Conboy will not be prosecuted. But Conboy might be prosecuted. Plaintiffs assure us that the deposition testimony could never be used against Conboy. But that testimony might be used against him. And when he does testify, he might face the possibility of perjury or waiver.

In the face of these uncertainties, we should not conclude that Conboy's Fifth Amendment protections do not apply. We reverse the lower court judgment.

CUMMINGS, *Chief Judge*, dissenting. For the reasons so ably presented in Judge Swygert's majority panel opinion, 655 F.2d 748 (7th Cir. 1981), I cannot agree with the majority *en banc* opinion. I merely wish to add a few words to Judge Swygert's prior opinion herein.

The *en banc* opinion faults both the panel opinion and the Second Circuit's similar analysis in In re *Corrugated Container Antitrust Litigation, Appeal of Fleischacker*, 644 F.2d 70 (2d Cir. 1981), for failing to grasp that under 18 U.S.C. § 6002 only the deposition questions would be derived from Mr. Conboy's earlier immune testimony, while any answers would come from his independent recollection. This is an arid distinction: it rests on an unduly restrictive reading of the statutory language and on a misconception about the effect of repetition of testimony.

Section 6002 prevents both state and federal prosecutors from using "testimony or other information compelled under [a Section 6002 grant of immunity] (or any information directly or indirectly derived from such testimony or other information) * * * against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order [granting immunity]." The panel majority would have treated Mr. Conboy's answers as falling within the category of "information directly or indirectly derived" from his immune testimony, where the questions were asked so as to afford Mr. Conboy the choice of (1) repeating his originally immunized answer, (2) adopting his immunized answer when it was repeated to him, or (3) affirming that the transcript of his immunized answer was his prior testimony. See note 2 *supra*.

The *en banc* majority admits that the questions asked of Mr. Conboy were "information directly or indirectly derived from [the immunized testimony]," but argues that the answers, no matter how closely they replicated the earlier responses, cannot be. No explanation is offered for giving the general word "information" in Section 6002 such a particularized meaning, but there seems to be an almost metaphysical notion that the mere repetition or acknowledgment by Mr. Conboy of his earlier testimony constitutes new and independent evidence.

In no case cited in the *en banc* majority's discussion, pages 17-18 and note 14 *supra*, does a witness who had been granted immunity in one proceeding forfeit it simply by testifying in another proceeding. Thus *United States v. Kuehn*, 562 F.2d 427 (7th Cir. 1977), does not suggest that "the defendant had created independent testimony by repeating his immunized testimony as a witness in another trial," page 17 *supra*. It makes two less controversial points: (1) that a state prosecutor, who began his investigations before federal immunity was granted and took the results to a grand jury without knowledge of the immunized testimony, did not use information "directly or indirectly derived" from the immunized testimony, 562 F.2d at 430; and (2) that the witness, by talking voluntarily to a newspaper reporter,

had "created independent evidence legitimately available to the state prosecutor," *id.* at 432. *United States v. First Western State Bank of Minot*, 491 F.2d 780 (8th Cir. 1974), certiorari denied *sub nom. Thompson v. United States*, 419 U.S. 825, holds only that defendants who had been granted transactional immunity for state grand jury proceedings could be prosecuted on federal charges if the federal prosecutors could show independent and untainted sources for their evidence. Repetition of testimony was not a problem since defendants had given no testimony in the interval between the state grand jury appearance and the federal criminal case. In *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958), defendants had never been granted immunity for their grand jury testimony and were therefore entitled to interpose the Fifth Amendment in subsequent proceedings where repetition of the earlier testimony was sought.

In contrast to these factually inapposite cases, Judge (now Justice) Stevens' strong dictum in *Patrick v. United States*, 524 F.2d 1109 (7th Cir. 1975), is directly on point. There the Internal Revenue Service had approved a jeopardy assessment against the taxpayer based on his immunized grand jury testimony about his gambling activities and income. The taxpayer argued that forcing him to resort to a refund suit would burden his Fifth Amendment rights. He would be put to a Hobson's Choice: he must either repeat his grand testimony and lose his immunity or forego his refund claim. Judge Stevens' answer to Mr. Patrick's plight applies equally to Mr. Conboy's: "[O]n the facts alleged by Patrick, such later testimony would be elicited only because the government could use the grand jury testimony as a basis for the assessment. Thus, any testimony elicited in the tax proceeding would be 'information . . . indirectly derived from . . . testimony' compelled under the original immunity grant and thus could not be used against Patrick in any criminal proceeding." 524 F.2d at 1120.

The method of the *en banc* majority is first to read the use immunity statute to afford only parlous and nugatory protection and then, of necessity, to find such protection an inadequate substitute for Fifth Amendment rights.

In my opinion, the district court's contempt order should be affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1960

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION.

APPEAL OF: JOHN CONBOY,

Deponent.

Appeal from the United States District Court for the Southern District of Texas, Houston Division.
No. MDL 310—John V. Singleton, *Judge.*

ARGUED JULY 15, 1981—DECIDED JULY 17, 1981

Before CUMMINGS, *Chief Judge*, SWYGERT, *Senior Circuit Judge*, and SPRECHER, *Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* This is an appeal from an order holding a non-party deponent in civil contempt for asserting the Fifth Amendment in response to questions read verbatim from or closely tracking transcripts of the deponent's previously immunized testimony. The district court ordered the deponent to answer the questions apparently on the ground that he would not be subject to future criminal prosecution based on this testimony. For the reasons stated herein, we affirm the order of the district court.

I

Appellant John A. Conboy is a former employee of Weyerhaeuser Company, one of the defendants in this civil antitrust action instituted by plaintiffs, purchasers

of corrugated containers who elected to opt out of the class action brought by other purchasers. In January, 1978, Conboy received a letter from the Department of Justice asking him to appear for an interview in connection with a criminal investigation of alleged price fixing in the corrugated container industry. The letter stated that:

> the information which you reveal in the course of the interview and the transcript derived therefrom, along with the personal documents which you deliver to us, will be given the same treatment and protections afforded statements made before a grand jury pursuant to a court order compelling testimony and granting immunity.

On January 10, 1978, Conboy submitted to the interview, in which he answered questions concerning his participation in and knowledge of the alleged price fixing.

By court order on January 16, 1978, Conboy was granted use immunity for his testimony before the grand jury pursuant to 18 U.S.C. § 6001 *et seq.* Conboy then testified before the grand jury, restating the information he had provided in the interview and expanding on his knowledge of alleged communications and agreements regarding prices. Several defendants were indicted as a result of a grand jury investigation.

Following the criminal trial, numerous civil antitrust actions were filed in various district courts. These lawsuits were consolidated by the Judicial Panel on Multi-District Litigation and assigned to Chief Judge John V. Singleton, Jr. of the Southern District of Texas.[1] The class action plaintiffs have either tried or settled their claims against these defendants, but the cases of eighteen opt-out plaintiffs are still pending.

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[1] Judge Singleton previously presided over the federal grand jury investigation of the corrugated container industry, the subsequent criminal trial of corrugated container manufacturers for price fixing, and the class action instituted by corrugated container purchasers.

Pursuant to a subpoena issued by the United States District Court for the Northern District of Illinois, Conboy appeared with counsel for a deposition on May 20, 1981. Counsel for the opt-out plaintiffs asked Conboy questions either taken verbatim from or closely tracking the transcripts of his grand jury testimony and Justice Department interview. Conboy, on advice of counsel, asserted his Fifth Amendment privilege in response to the questions.

Counsel for plaintiffs then telephoned Judge Singleton and moved him to compel Conboy to answer the questions. After hearing arguments of counsel for both sides and questioning Conboy, the judge, expressly invoking his authority to exercise the powers of the District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1407(b), ordered Conboy to answer the questions. When Conboy continued to assert his Fifth Amendment privilege, the judge held him in contempt of court but stayed the operation of the order pending this appeal.[2]

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[2] Both Conboy and the opt-out plaintiffs contend that this court has jurisdiction over the appeal after the Fifth Circuit's decision in *In re Corrugated Container Antitrust Litigation, Appeal of Franey*, 620 F.2d 1086 (5th Cir. 1980). Rule 45(d)(2) of the Federal Rules of Civil Procedure provides that a deponent can be required to appear at a deposition only in the county in which he resides or is employed or transacts business. As a non-party witness, Conboy was not subject to the jurisdiction of the district court for the Southern District of Texas. *See Franey, supra*, 620 F.2d at 1090 & n.3. Rule 37(a)(1) provides: "An application of an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken." The Fifth Circuit interpreted that provision to mean that only the court sitting in the district where the deposition was being taken has the power to compel testimony and enter a contempt order against the deponent. Because Judge Singleton, in *Franey* as well as the case at bar, was exercising the powers of a district judge in the district where the deposition was being taken pursuant to 28 U.S.C. § 1407(b), then according to the Fifth Circuit, the appeal must be taken in "the court of appeals for

(Footnote continued on following page)

II

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 444 (1972). The Fifth Amendment privilege may be invoked, however, only when "'the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination.'" *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968)). The privilege may be supplanted, and a witness ordered to testify, by a grant of immunity that is co-extensive with the privilege because "the grant of immunity has removed the dangers against which the privilege protects." *Kastigar*, *supra*, 441 U.S. at 449.

In the case at bar, Conboy was granted use immunity pursuant to 18 U.S.C. § 6002[3] for his testimony before

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[2] *continued*
the circuit embracing the district" in which the contempt order was entered. 28 U.S.C. § 1294.

As the Second Circuit has noted, however, because section 1407 consolidates multi-district cases to achieve greater efficiency, "it is arguable that its purposes would be best served by permitting appeals to only one circuit." *In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker*, 644 F.2d 70, 74 n.6 (2d Cir. 1981). Nevertheless, we agree with the parties that under 28 U.S.C. § 1294 we have jurisdiction over this appeal from a contempt order entered by a district judge exercising the power of a district judge in the Northern District of Illinois. *See Fleischacker*, *supra*, 644 F.2d at 74 n.6.

[3] 18 U.S.C. § 6002 provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
> (1) a court or grand jury of the United States,
> * * *
> and the person presiding over the proceeding communicates to the witness an order issued under this part,

(Footnote continued on following page)

the grand jury. The terms of the immunity statute prohibit the use of the immunized testimony or any information "directly or indirectly derived from" it in any criminal case except a perjury prosecution. *Id. See also Kastigar v. United States, supra*, 406 U.S. at 449. Because the questions asked in this deposition were taken verbatim from or closely tracked the transcript of Conboy's grand jury testimony, we believe that his answers at the deposition would be "derived from" the prior immunized testimony and therefore would be unavailable for use in any subsequent criminal prosecution.

Two other circuits that considered this question have reached the same conclusion. In *In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker*, 644 F.2d 70 (2d Cir. 1980), the deponent, like Conboy, was a former employee of one of the defendants in this case. His earlier testimony before the grand jury was immunized pursuant to 18 U.S.C. § 6002, and the examining counsel confined his questions to those taken verbatim from or closely following the transcript of that testimony. When the deponent refused to answer the questions in spite of a court order compelling him to do so, Judge Singleton held him in contempt.

The Second Circuit, in affirming the contempt order, held that:

> where a transcript of a witness' immunized testimony constitutes the source of questions posed to the same witness in a civil proceeding, responsive answers to such questions are necessarily 'derived from' the immunized testimony, and thus unavailable for subsequent prosecutorial use. Since

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[3] *continued*

the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

> answers to questions derived from immunized testimony cannot be used against the witness in any criminal proceeding, it follows that, in such cases, the Fifth Amendment privilege against self-incrimination cannot be properly invoked. Therefore, once a court determines that immunized testimony has provided the source of the questions posed, the court may compel the witness to respond without infringing the Fifth Amendment.

Fleischacker, supra, 644 F.2d at 77.

Appeal of Starkey, 600 F.2d 1043 (8th Cir. 1979), concerned an alleged price-fixing conspiracy in the dairy industry. The deponent appealed from an order holding him in contempt for asserting his Fifth Amendment privilege at a civil deposition. As in the case at bar, the deponent was asked questions taken from the transcript of his previously immunized testimony before a grand jury. The Eighth Circuit held that as long as the questions were restricted to "the same time, geographical and substantive framework as the grand jury testimony," then he could not properly invoke the Fifth Amendment. *Id.* at 1048. The court stated that the deponent "clearly has immunity from criminal prosecution for the [civil] deposition testimony because such testimony would be tainted by the federal grand jury testimony for which [he] received 'use' immunity pursuant to 18 U.S.C. § 6001 *et seq.*" *Id.* at 1046. *Accord, Little Rock School District v. Borden, Inc.*, 632 F.2d 700 (8th Cir. 1980) ("the immunization of their testimony before the . . . grand jury protects them from any subsequent prosecution, state or federal, in which direct or indirect use of this testimony is made").

Our holding today is consistent with our opinions in *Patrick v. United States*, 524 F.2d 1109 (7th Cir. 1975) and *In re Folding Carton Antitrust Litigation, Appeal of Brown*, 609 F.2d 867 (7th Cir. 1979). In *Patrick*, the taxpayer challenged a jeopardy assessment that was based on information given by the taxpayer in his immunized testimony before a grand jury. He argued that forcing him to resort to a refund suit to challenge the assessment puts an impermissible burden on his privilege

against self-incrimination because in a refund suit he would have the burden of proof and would necessarily have to present incriminating evidence. The court rejected this argument on the ground that "such later testimony would be elicited only because the government could use the grand jury testimony as a basis for the assessment." 524 F.2d at 1120. Therefore, the testimony in the later proceeding could not be used against the taxpayer in any criminal action because it would be "information . . . indirectly derived from" immunized testimony. *Id.*

In *Brown*, *supra*, we held that "[w]hen a witness can demonstrate any possibility of prosecution which is more than fanciful," then he has the right to invoke his Fifth Amendment privilege.[4] 609 F.2d at 871. We further stated:

> To the extent that an assessment of the probability of prosecution is significant in the trial court's evaluation of an asserted privilege, it is more properly accomplished through examination of the more traditional tests, *viz*, statute of limitations, *immunity*, double jeopardy. *Short of the existence of one of these indicia of an absolute bar to subsequent prosecution*, a judge's prediction as to the likelihood of a prosecutor filing an indictment is not dis-

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[4] Conboy contends that because the federal statute of limitations for conspiracy and certain state statutes of limitations for antitrust violations have not yet run, it is still possible that he could be prosecuted for the activities about which he testified. Our holding today makes it unnecessary for us to consider that question, although Chief Judge Cummings agrees with Judge Singleton's resolution thereof, but on the ground that any possibility of Conboy's prosecution is "fanciful." *In re Folding Carton Antitrust Litigation, Appeal of R. Harper Brown*, 609 F.2d 867, 871; *see also, e.g., United States v. Apfelbaum*, 445 U.S. 115, 128.

Judge Cummings adds that these plaintiffs are entitled to this testimony because (as the dissent acknowledges) the vagaries of evidentiary rulings might otherwise prevent its admission at the coming trial.

> positive in ascertaining the permissible scope of a claim of fifth amendment privilege.

Id. at 872 (footnotes omitted). Although the issue in *Brown* differed from the one presented by the case at bar, we recognized then that the question whether the testimony is protected by a grant of immunity should be examined by the court in determining the propriety of the assertion of the privilege.

III

Conboy contends that Judge Singleton's decision is a "de facto" grant of immunity, and that his ruling confuses the standard for proper invocation of the privilege against self-incrimination with the exclusionary rule that prevents the introduction of evidence against a witness when the district court has made an erroneous ruling on privilege.[5] *See Brown, supra*, 600 F.2d at 872 n.11. We cannot agree with that characterization of the district court's holding.

It is well established that a court, although it may not grant immunity to a witness, may interpret the scope of a grant of immunity. *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); *Kastigar, supra*, 406 U.S. at 453; *Fleischacker, supra*, 644 F.2d at 78; *Starkey, supra*, 600 F.2d at 1048. In the case at bar, we must determine if Conboy's testimony at the deposition would be immunized in order to rule on the propriety of his assertion of the Fifth Amendment privilege. In holding that

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[5] The dissenting opinion reasons that our decision today creates a de facto grant of future immunity by determining that the later use of this testimony will be subject to an exclusionary rule. The dissent then quotes from *Ellis v. United States*, 416 F.2d 791, 796 (D.C. Cir. 1969). The analysis condemned in *Ellis* and in other contexts is that a witness may be ordered to testify regardless of the propriety of the privilege asserted on the ground that the testimony will be excluded in the future. In the case at bar, however, we have not concluded that regardless of Conboy's claim of privilege, the later testimony must be excluded. Rather, we have concluded that Conboy has no privilege to assert.

his deposition testimony could not be used against him in a subsequent criminal prosecution because it would be derived from his previous immunized testimony, we are merely interpreting the scope of that grant of immunity.[6]

The dissenting opinion, relying on *Kastigar*, reasons that compelling Conboy to testify at the deposition would create a new source of evidence and that the coextensive immunity granted for Conboy's testimony in an earlier proceeding would not protect the deposition testimony because the earlier immunity "protects only the *source*, not the *substance* of the information."[7] *Infra* at 26. This statement is followed by a quotation from *Kastigar*, 406 U.S. at 453.

The analysis simply ignores the basic issue in this case and any case involving use immunity granted under section 6002—that is, whether the deposition testimony is directly or indirectly derived from the immunized testimony. If so, then the testimony receives the same protection as the earlier testimony. The dissenting opin-

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[6] As Conboy notes in his brief, he could be subject to prosecution for perjury if his answers at the deposition are inconsistent with those he gave before the grand jury. This does not, however, compel a different conclusion. It is clear that the district court has the authority to inquire into the basis for a witness's claim of Fifth Amendment privilege. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Brown*, *supra*, 609 F.2d at 871 n.5. If Conboy, by answering truthfully any question at the deposition, would be risking prosecution for perjury, he would of course be permitted to invoke the privilege.

[7] *United States v. Kuehn*, 562 F.2d 427 (7th Cir. 1977), cited by the dissent, is not to the contrary. In *Kuehn*, we held that a defendant who voluntarily restates the substance of his prior immunized testimony creates an independent source of incriminating evidence that is not protected by the prior grant of immunity. That decision is clearly distinguishable from the instant case in which the court compelled the deponent to testify over his assertion of his Fifth Amendment privilege only as to matters within the scope of his prior immunized testimony.

ion fails to deal with this issue of statutory construction and merely states that our holding that the later testimony is directly or indirectly derived from the immunized testimony is conclusory. But the analysis of the dissenting opinion fares no better under its own criticism—it concludes that the later deposition would create an independent source and the immunity protects "substance" and not "source." Unfortunately, this provides little insight into determining when a source is independent or when testimony is directly or indirectly derived from immunized testimony.[8]

The dissenting opinion relies on *Kastigar*, *supra*, 406 U.S. at 453, as support for its "substance not source" analysis, but *Kastigar* does not support the proposition. The quoted passage is merely a discussion of the difference between use and transactional immunity—"The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted."

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[8] A recurring problem in the analysis adopted by the dissent is a confusion between transactional and use immunity. This is evident where the dissent, *infra* at 27 n.14, states that the later deposition creates an independent source, and relies on the fact that separate grants of immunity were provided to Conboy for his initial interview and for his grand jury testimony. Two different grants of immunity may have been necessary because the prosecutor wished to ask questions before the grand jury that were beyond the scope of the Justice Department interview.

A simple hypothetical illustrates the distinction that the dissenting opinion apparently overlooks. Assume that two codefendants engaged in criminal activity. One defendant is called before the grand jury and given use immunity. He testifies and is later deposed in a related civil case. Under our ruling today, he may be compelled to testify as to those matters discussed before the grand jury. If his codefendant confesses and decides to testify against him at a later criminal trial, nothing in our ruling would prohibit this prosecution. As long as the evidence obtained from the codefendant is independent of the grand jury testimony, the defendant may be tried and convicted for acts that were the subject of the grand jury testimony. Likewise, Conboy may later be prosecuted if independent evidence is obtained.

Id. This language is fully consistent with our analysis—only testimony directly or indirectly derived from the earlier grand jury testimony is immune. If prosecutors obtain evidence from a source independent of the grand jury testimony, Conboy may still be prosecuted.[9]

For the foregoing reasons, the order of the district court is AFFIRMED.

SPRECHER, *Circuit Judge*, dissenting. I respectfully dissent.

I

John A. Conboy is a former executive of the Weyerhaeuser Company. He was one of numerous immunized grand jury witnesses in an investigation leading up to the indictments of fourteen companies and twenty-six individuals for a nationwide conspiracy to fix prices in the corrugated container industry. Relying on a promise of immunity from the Justice Department, Conboy submitted to an interview by Justice Department attorneys who questioned him extensively concerning his participation in and knowledge of alleged price communications and agreements among suppliers in the corrupted container industry. Subsequently, Conboy testified before a grand jury regarding these issues, having received a separate and independent grant of use immunity.

Following the conclusion of the criminal trial, numerous civil actions were brought against the major

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[9] The dissenting opinion discusses the possibility that the deposition testimony may stray from the four corners of the grand jury testimony and that therefore the Government may be prejudiced in any future attempt to prosecute Conboy because all future evidence might be tainted. This speculative prejudice is better solved by a practical solution. If Government prosecutors are concerned about Conboy being "tricked" into discussing other matters, they might come forward and ask to be present at the deposition to protect any interest the Government might have.

corrugated container manufacturers, including Weyerhaeuser. These civil cases were consolidated in *In Re Corrugated Container Antitrust Litigation*, MDL 310 (S.D.Tex.). In this litigation, class action plaintiffs either tried or settled their claims. The class trial and many of the class settlements are the subject of pending appeals. Eighteen "opt-out" cases remain pending before the district court. The opt-out plaintiffs allege, among other things, that the defendants were engaged in, and fraudulently concealed, an ongoing price-fixing conspiracy in the corrugated container industry through 1978.

The opt-out plaintiffs subpoenaed several previously immunized grand jury witnesses, including Conboy, for deposition testimony and production of documents. On May 20, 1981, Conboy appeared with counsel in Chicago for deposition pursuant to a subpoena. At his deposition, Conboy initially testified as to the dates and general nature of his employment with Weyerhaeuser. He was then asked: to confirm that he had testified at the Justice Department interview and the grand jury; to identify as "true and correct" a transcript of his interview and of his grand jury testimony;[1] and whether his responses at the interview and before the grand jury had been true and correct. Conboy refused to answer these and other questions pertaining to his interview and grand jury testimony on the basis of the Fifth Amendment privilege

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[1] The parties do not dispute that the plaintiffs received copies of the transcripts of the Justice Department interview and the grand jury testimony. In this appeal, the parties do not state how these transcripts were made available to them. In *In re Corrugated Container Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086 (5th Cir. 1980), involving an appeal from the same multi-district litigation by other witnesses for refusals to answer deposition questions regarding previous grand jury testimony, the transcript had been made available to the plaintiffs by court order, which was appealed. 620 F.2d at 1089 n.2. Here, Conboy does not challenge the provision of transcripts to plaintiffs and we express no opinion as to the propriety of that action.

against self-incrimination.[2] He did acknowledge that any testimony which he may have provided was given pursuant to prior grants of immunity. Conboy's counsel advised the plaintiffs' counsel that Conboy would invoke his Fifth Amendment privilege in response to all further questions concerning pricing activities during his tenure as Weyerhaeuser's Regional Marketing Coordinator in Worthington, Ohio.

The plaintiffs' counsel then suspended the deposition and telephoned the judge presiding over the multidistrict litigation. The judge was informed of the relevant facts regarding Conboy's employment with Weyerhaeuser, and that Ohio had no statute of limitations

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[2] The balance of the deposition consisted of questions previously asked at the Department of Justice interview concerning Conboy's alleged involvement in price fixing activities during his tenure as Regional Marketing Coordinator for Weyerhaeuser's Central Region in Worthington, Ohio. The interrogation fell into the following pattern: a question was asked from the transcript; then it was rephrased to include the transcript answer (i.e., "[i]s it not the fact that . . . ."); finally, Conboy would be asked if he had "so testified" in his interview statement. Examples of this three-question pattern are as follows:

> Q: Who did you have price communications with at Alton Box Board?
>
> . . . .
>
> Q: Is it not the fact that you had price communications with Fred Renshaw and Dick Hermans . . . at Alton Box Board?
>
> . . . .
>
> Q: Did you not so testify in your government interview statement of January 10, 1978?

Tr., 20, 20-21, 22.

> Q: Would your prices be at or above his prices, referring to Alton's prices?
>
> . . . .
>
> Q: Is it not the fact that you would price slightly above or slightly below the Alton prices?
>
> . . . .
>
> Q: And did you not so testify in your government interview statement?

Tr., 31, 32.

for antitrust actions.[3] Conboy's counsel argued that, even though the prior testimony had been immunized, new answers to those questions, or even new answers confirming that the previous answers had been made could tend to incriminate Conboy.

The district court judge advised the parties that he was empowered to sit as a district judge in Illinois under 28 U.S.C. § 1407,[4] and began to question Conboy regarding his employment history in Ohio and his knowledge of possible prosecution by Ohio authorities.[5]

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[3] Ohio's criminal antitrust states in pertinent part:

> No Statute of Limitation shall prevent or be a bar to any suit or proceeding for any violation of Section 1331.01 to 1331.14, inclusive, of the Revised Code.

Ohio Rev. Code Ann. § 1331.12. The constitutionality of this statute has been upheld in *Ohio ex rel. Brown v. Klosterman French Baking Co.*, 1977-1 Trade Cases (CCH) ¶61361 (S.D. Ohio, 1976).

[4] 28 U.S.C. § 1407(b) provides, in pertinent part, that, in multidistrict litigation, judges to whom pretrial proceedings are assigned "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions . . . ." *See In re Corrugated Container Antitrust Litigation, Appeal of Phillip L. Fleischacker*, 644 F.2d 70, 76 n.6 (3d Cir. 1980).

[5] This interrogation concluded with the following:

> Q: Now, has anyone from the Attorney General's Office in Ohio contacted you relating to your work?
> A: No.
> Q: Prior to December 31, 1975?
> A: No, sir.
> Q: Are you a party to any lawsuit involving that work?
> A: I am not.
> Q: Have you been called as a witness—other than in this case—in any case arising out of Ohio?
> A: No, Your Honor, I haven't.
> Q: Related to the corrugated industry and your work in that industry?
> A: No, sir.

Tr., 51-52.

Based on Conboy's inability to establish the existence of a pending criminal investigation, the court ordered him to answer the specific questions previously asked. Conboy again refused to answer, asserting his Fifth Amendment privilege. The court found him to be in civil contempt pursuant to 28 U.S.C. § 1826, fined him $5,000, and imposed a six-month imprisonment. The court stayed execution of the order pending appeal. Conboy now appeals to this Court pursuant to 28 U.S.C. § 1826[6]

II

There are two major issues in this appeal. The first is whether Conboy faces any risk of prosecution.[7] The second is, even if there is a risk of prosecution, whether a court can deny the protection of the Fifth Amendment if it concludes that the answers to the questions asked will be so "tainted" by previous grants of immunity that those answers will be inadmissible in subsequent criminal proceedings. Before reaching these two issues, however, it is important to examine the proper scope of interpretation of the Fifth Amendment's protection against self-incrimination.

The Fifth Amendment to our Constitution states that "[n]o person shall . . . be compelled in any criminal case to be witness against himself." U.S. Const. Amend. V. The plaintiffs argue that the testimonial privileges of

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[6] 28 U.S.C. § 1826(b) provides, in pertinent part, that "[a]ny appeal from an order of confinement under this section [recalcitrant witnesses] shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." Conboy's appeal was docketed with this Court on June 17, 1981. The parties completed their submission of briefs to this Court on July 10, 1981.

[7] A preliminary question is whether answers to the questions in issue might tend to reveal that the witness was engaged in criminal activity. *In re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086, 1091 (5th Cir. 1980). Here, there is no serious dispute that Conboy's answers might tend to reveal that he was engaged in criminal activity.

the Fifth Amendment must be narrowly construed. Relying on *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), the plaintiffs argue that "the public is entitled to every man's evidence." Pl. Br. at 6. First, *Branzburg* is inapposite, as it held that the First Amendment created no "reporter's privilege" not available to other citizens. Second, plaintiffs failed to complete the quoted sentence in *Branzburg*. The Court carefully acknowledged limitations on the right to evidence, stating, "the long-standing principles that 'the public . . . has a right to every man's evidence,' *except for those persons protected by a constitutional, common-law, or statutory privilege*, . . . is particularly applicable to grand jury proceedings." (emphasis added) (citations and footnote omitted). Indeed, the *Branzburg* Court added, to further emphasize that it in no way envisioned any narrowing of the Fifth Amendment:

> Until now the only testimonial privilege for unofficial witnesses that is rooted in the federal constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

408 U.S. at 689-90 (footnote omitted).

The plaintiffs also rely on *United States v. Nixon*, 418 U.S. 683 (1974) as supporting their contention that a constitutional protection should be narrowly interpreted when balanced against a private litigant's evidentiary need. But the plaintiffs' reliance on *Nixon* is also misplaced. The *Nixon* Court emphasized that the issue before it did not involve balancing a *specific* constitutional privilege against the need for evidence in *civil* litigation.[8] The Court's care in expressing what it

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[8] The *Nixon* Court stated:

> We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional

(Footnote continued on following page)

was *not* considering suggests that even an evidentiary privilege not specifically stated in the Constitution, such as that asserted by President Nixon, should be given a high degree of deference. *Nixon* in no way derogates from the fundamental primacy of constitutional principles.

The Fifth Amendment privilege against self-incrimination is one of the core concepts of our adversary judicial system. The privilege is a shield against the dangers of an inquisitorial system of jurisprudence. As Justice Blatchford stated in *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), the Fifth Amendment privilege "must have a broad construction in favor of the right which it was intended to secure." The passage of time since *Counselman* has not seen any diminution in the need for constant vigilance by courts against the narrowing of this fundamental constitutional protection.

In view of the high place that the Fifth Amendment privilege occupies, both in our Constitution and in our judicial system, and in view of the strong traditional respect for each individual's rights that undergirds the privilege, the Court "has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action." *Maness v. Meyers*, 419 U.S. 449, 462 (1975) (citations omitted). As the Court stated in *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972):

> But the power to compel testimony is not absolute. There are a number of exceptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and

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[8] *continued*

demands for information, nor with the President's interest in preserving state secrets. We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials.

418 U.S. at 712 n.19.

> marks an important advance in the development of our liberty . . . . This Court has been zealous to safeguard the values that underlie the privilege.

(footnotes omitted). *See Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55 (1964) ("The Fifth Amendment privilege reflects many of our fundamental values and most noble aspirations . . . ."); *Ullman v. United States*, 350 U.S. 422, 426, 426-29 (1956) ("Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit.") (Frankfurter, J.); *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (privilege must be accorded liberal construction); and *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920) (privilege must be accorded broad construction).

III

Cognizant of the need for a liberal construction of the fundamental Fifth Amendment privilege against self-incrimination, we now consider whether Conboy faced any risk of prosecution. The district court concluded, first, that Conboy could not face federal charges because the applicable five-year statute of limitations had run. Second, the district court seemed to conclude that Conboy would not face any charges in Ohio because Conboy admitted he did not know of any litigation related to the corrugated industry in the state of Ohio.[9] But the court's reasoning is erroneous for several reasons.

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[9] The district court's order provided, in part, as follows:

> The federal statute of limitations is four [sic] years which indicates that Mr. Conboy would be subject to federal prosecution for the period before December 31, 1975. Counsel for John A. Conboy stated that Mr. Conboy may be subject to prosecution in Ohio where there exists no applicable statute of limitations for antitrust violation. The Court questioned Mr. Conboy as to whether he knew of any pending litigation related to the corrugated industry in the state of Ohio. Mr. Conboy answered that he

(Footnote continued on following page)

A

First, and most fundamental, as this court recently held, the protection of Fifth Amendment applies so long as there is *any possibility* of prosecution, regardless of a judge's assessment of the likelihood of prosecution. *In re Folding Carton Antitrust Litigation, Appeal of R. Harper Brown*, 609 F.2d 867 (7th Cir. 1979). I reiterate the importance of our holding in *Brown*:

> Short of the existence of one of these indicia [*viz.*, statute of limitations, immunity, double jeopardy] of an *absolute bar* to subsequent prosecution, a judge's prediction as to the likelihood of a prosecutor filing an indictment is not dispositive in ascertaining the permissible scope of a claim of Fifth Amendment privilege.

609 F.2d at 872 (footnotes omitted) (emphasis added).

This court's decision in *Brown* was relied upon by the Fifth Circuit Court of Appeals in an appeal from the same multi-district litigation on the identical substantive issue as the present case. *In re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086 (5th Cir. 1980). In *Franey*, three deposition witnesses sought review of contempt citations entered against them by the district court when they asserted their Fifth Amendment privilege in civil depositions to questions that were contained in the transcript of their prior immunized grand jury testimony. The Fifth Circuit sustained the witnesses' assertion of the Fifth Amendment privilege, because the risk that they would be prosecuted was "more than fanciful." 620 F.2d at 1092, *quoting Brown*, 609 F.2d at

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[9] *continued*

has not been contacted to testify nor does he know of any such litigation in Ohio. Counsel for John A. Conboy did not present proof that any other applicable statute of limitations had not run.

In re Corrugated Container Antitrust Litigation, Order Adjudging John A. Conboy To Be In Civil Contempt of Court, MDL 310, 2 (S.D.Tex. May 20, 1981).

871. *See In re Master Key Litigation*, 507 F.2d 292, 293 (9th Cir. 1974) (witness justified in refusing to answer unless the only danger is imaginary); *United States v. Johnson*, 488 F.2d 1206, 1209 n.2 (1st Cir. 1973) ("neither the practical unlikelihood of further prosecution, nor the Assistant United States Attorney's denial of an intention to charge conspiracy, negated [the defendant's] privilege"); and *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958) (no justification for limiting the Fifth Amendment privilege whenever it appears the government would not undertake to prosecute).

The "absolute bar" test recognizes that, to the extent any doubt exists regarding the validity of the claimed Fifth Amendment privilege, the benefit of that doubt must go to the witness asserting the privilege. The determination whether to prosecute is exclusively within prosecutorial discretion. The validity of the privilege cannot be grounded on a district court's prediction of the likelihood of prosecution because the past and present behavior of prosecutorial authorities is not a sufficiently accurate indication of the risk of criminal prosecution. *See Miranti*, 253 F.2d at 139.[10]

Not only must the benefit of the doubt go to the witness claiming Fifth Amendment privilege, but also the burden of proof as to any prosecution must not be improperly shifted to the witness. As the Court stated in *Hoffman*, the witness must not be required to prove the possibility of prosecution "in the sense in which a claim

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[10] The *Miranti* court stated:

> We find no justification for limiting the historic protections of the Fifth Amendment by creating an exception to the general rule which would nullify the privilege whenever it appears that the government would not undertake to prosecute. Such a rule would require the trial court, in each case, to assess the practical possibility that prosecution would result from incriminating answers. Such assessment is impossible to make because it depends on the discretion exercised by a United States Attorney or his successor.

253 F.2d at 139 (footnotes omitted).

is usually required to be established in court." 341 U.S. at 486. Here, the trial court seemed to base its contempt order, in part, on Conboy's failure to prove the existence of an impending criminal prosecution against him. *See* note 9, *supra*. This basis for the contempt order is clearly incorrect. So long as there is any basis for a prosecution, the Fifth Amendment protection applies.

B

The district court erred in concluding that Conboy could not face federal charges for his activities prior to December 31, 1975. Although the statutes of limitations have run for the antitrust charges, the plaintiffs admit that the federal statute of limitations for conspiracy does not begin to run until a defendant's last act in furtherance of the conspiracy. Unless an individual can show withdrawal from the conspiracy by an affirmative act designed to defeat the purpose of the conspiracy, that defendant remains liable for all acts committed by co-conspirators until the conclusion of the conspiracy. *See United States v. Fitzgerald*, 579 F.2d 1014 (7th Cir.) *cert. denied*, 439 U.S. 1002 (1978) (prosecution of defendants not barred by statute of limitations even though they ceased active participation in the conspiracy seven years before the indictment). Conboy must harbor a reasonable fear of prosecution for federal antitrust conspiracy until 1983.

The plaintiffs argue that Conboy is not "really" subject to federal prosecution because a Justice Department attorney, in a letter to another defendant in the corrugated container civil litigation stated that the Justice Department had no intention to prosecute any previously immunized witness in the corrugated container litigation. But this is a slender reed indeed on which to deny the fundamental constitutional protection afforded by the Fifth Amendment privilege. Plaintiffs cite no law stating that the Justice Department letter is binding on the Justice Department with regard to Conboy. *See Miranti*, 253 F.2d at 139, quoted at note 10 *supra*. The key point, which plaintiffs concede, is that notwithstanding the Justice Department letter, Conboy *does* remain liable to subsequent federal prosecution.

Even if we assume—and I do not—that the Justice Department is somehow bound by a letter of one of its attorneys, it is undisputed that Conboy is subject to state antitrust charges in Ohio. Plaintiffs suggest, however, that the possibility of such prosecution is "fanciful", and that Conboy could successfully plead laches as a defense.

Plaintiffs' counsel ask us to determine, as a matter of law, that the possibility of an Ohio action against Conboy is fanciful merely because, to date, Ohio has not instituted any action of the corrugated container industry of which plaintiffs' counsel are aware. But Fifth Amendment protections should not be eviscerated merely on plaintiffs' counsels' assurances that they do not happen to know of any Ohio investigation of the corrugated container industry. Indeed, the lack of foundation for such assurances is seen in the admission of one of plaintiffs' counsel, at oral argument before this Court, that he did not know that, as indicated in *Franey*, 620 F.2d at 1092, a federal grand jury sitting in Ohio had begun its own investigation of the corrugated container industry. If counsel did not know of this federal grand jury, they very well might not also know of a state grand jury, should one be sitting.[11] This example demonstrates that constitutional protections should not be denied based on

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[11] In a letter after oral argument, plaintiffs' counsel stated:

> In the course of the oral argument in the case of *In Re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, there was a question concerning whether a federal grand jury was impaneled in Ohio to investigate the corrugated container industry. As I expressed to the Panel, it was my understanding that no such investigation was under way. To make certain that my representations to the Court were correct, Mr. Polster of the Justice Department, Antitrust Division, Cleveland Branch, was contacted concerning this matter. Mr. Polster confirmed the accuracy of my representation to this Court by stating that he was aware of no such grand jury investigation pending at this time. Moreover, Mr. McShane of the Ohio Attorney General's Office, Antitrust Division, has stated that his office has no knowledge of any Ohio antitrust criminal investigation into the corrugated container industry.

adversaries', or even on witnesses' knowledge of potential prosecutorial activities.

Plaintiffs respond by arguing that, even if Conboy should be prosecuted in Ohio, he would be able to invoke laches as a complete defense. For this unusual assertion, they rely on *Ohio ex rel. Brown v. Klosterman French Bakery Co.*, 1977-1 Trade Cases (CCH) ¶61,361 (S.D.Ohio 1976). First, as will be discussed, whether or not Conboy may utilize certain defenses in a subsequent criminal prosecution has no bearing on the legitimacy of his Fifth Amendment claim in the proceeding at issue. Second, *Klosterman*, a civil decision by a federal, not an Ohio, court in ruling on a motion for summary judgment specifically stated that it was not "ruling upon the applicability of the doctrine of laches in the context of this lawsuit." ¶61,361 at 71,274. Moreover, the *Klosterman* discussion of laches was based upon a quotation from *Gardner v. Panama R. R. Co.*, 342 U.S. 29, 30-31 (1951), which stated that laches was a question primarily addressed to the discretion of the trial court. Indeed, the *Gardner* Court held that laches was *not* a defense to the *civil* suit there in issue. Plaintiffs present no Ohio nor any other authority establishing that laches would necessarily be a successful defense to an Ohio prosecution of Conboy.[12]

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[12] Plaintiffs suggest that Ohio Rev. Code § 1331.13 would prevent a prosecution of Conboy. Ohio Rev. Code § 1331.13 provides, in pertinent part, as follows:

> If a court of record . . . in which is pending a civil or criminal action . . . so orders, no person shall be excused from attending, testifying, or producing books . . . or other documents . . . for the reason that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty. No person may be prosecuted or subjected to a penalty for or on account of a transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise, before such court, person, or officer.

This statute merely prohibits later prosecution of a witness required to testify *for the required testimony in the same proceeding*. Here, Conboy's testimony would not be ordered under the Ohio statute and, therefore, this statute would not prevent his prosecution.

Even given the possibility of a speculative laches defense, there is no dispute that Conboy remains subject to prosecution in Ohio. But plaintiffs argue that demonstrating this liability somehow "proves too much" because in Ohio antitrust actions are not subject to a statute of limitations. Ohio Rev. Code Ann. § 1331.12. I do not see how this long-term liability "proves too much." As I have discussed, the Fifth Amendment stands between a defendant and *any* possible prosecution. If the prosecution may be threatened over a long time, surely it does not "prove too much" to conclude that the Fifth Amendment protection must also exist for a long time. Otherwise, prosecutors could defeat the Fifth Amendment's protection by waiting to bring actions. Thus, the "proves too much" argument must fall.

In summary, despite the assurances of the plaintiffs to the contrary, Conboy might be prosecuted by both federal and state authorities. As we stated in *Brown*, so long as there is *any* possibility of prosecution, the Fifth Amendment privilege must apply. Whether Conboy actually would be prosecuted, we cannot predict and, therefore, is irrelevant. Any doubt as to the likelihood of possible prosecution must be resolved in favor of the witness.

IV

The next major question is whether a court can deny the protection of the Fifth Amendment privilege if it concludes that the answers to the questions asked will be so "tainted" by previous grants of immunity that those answers will be inadmissible in subsequent criminal proceedings. It is undisputed that, because his statements were made under grants of immunity, the transcripts of Conboy's Justice Department interview and grand jury testimony could not be used against him. But now, we must consider whether *new* answers to questions based on the earlier immunized testimony are, as a matter of law, *necessarily* themselves immunized.

There is a conflict of opinion among the circuits on this question. In *Franey*, the Fifth Circuit held that answers

to verbatim questions from prior immunized testimony were not protected by the original immunity grant. But in *In re Corrugated Container Antitrust Litigation, Appeal of Phillip Fleischacker*, 644 F.2d 70 (2d Cir. 1981), and in *In re Order of Civil Contempt, Appeal of Carlos Lee Starkey*, 600 F.2d 1043 (8th Cir. 1979), the Second and Eighth Circuits held that such answers were protected.

In my opinion, the better reasoning is found in the *Franey* decision. Also, for other reasons, I conclude that the district court's conclusion that Conboy's testimony could never be used against him in subsequent proceedings was erroneous.

A

It is important to distinguish, at the outset of this discussion, two different concepts. The first is the court's remedial power to exclude evidence which violates the Fifth Amendment. The second is the scope of the protection afforded by a grant of statutory immunity—aside from any later effort to remedy a violation of the privilege. The basic error committed by the district court is that it confused, and lumped together, these two concepts.

This complex issue requires precise analysis. The district court concluded that Conboy's previously granted use immunity would continue to protect him if, at a later date and in a totally separate proceeding, he repeated his deposition testimony. But this reasoning, apparently based on language in *Starkey*, 600 F.2d at 1047 (possibility of later exclusion of testimony repeating earlier, immunized testimony is all the protection afforded by 18 U.S.C. § 6001), *citing Kastigar v. United States*, 406 U.S. 441, 453 (1972), is conclusory and erroneous. The district court, and the *Starkey* court, misunderstood *Kastigar* and its precursors. This confusion can be seen by examining the nature of the concept termed "immunity".

There is no question that the Fifth Amendment privilege against self-incrimination may be asserted in a

civil proceeding, at discovery or trial, whether the person to be called is a party or a witness. In certain situations, however, the privilege can be supplanted by a statutory grant of use immunity, under 18 U.S.C. § 6001 et seq., which affords protection against self-incrimination *coextensive* with the Fifth Amendment privilege. *Kastigar*, 406 U.S. at 453. As the Court emphasized, this coextensive protection protects only the *source*, not the *substance* of the information.[13] *Kastigar*

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[13] The *Kastigar* Court stated:

> The statute's [18 U.S.C. § 6002] explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore, is sufficient to compel testimony over a claim of the privilege. *While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader.* Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. *The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted.*

441 U.S. at 453 (emphasis added). Later in the opinion, the Court again emphasized the limits of statutory use immunity:

> The statute, like the Fifth Amendment, grants neither pardon nor amnesty. *Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.*
>
> . . . .
>
> We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.

406 U.S. at 461-62 (emphasis added)

thus teaches that a grant of use immunity for a witness in one proceeding affords *no* protection for any self-incriminating information disclosed by the witness in other proceedings, prior or subsequent to the immunized proceeding.

Use immunity does not even shield a witness from prosecution based on the very facts and activities testified to under the grant of immunity. *See United States v. Kuehn*, 562 F.2d 427, 430, 432 (7th Cir. 1977) (defendant created independent evidence when he repeated previously immunized grand jury testimony to a reporter; court also suggested that the defendant had created independent testimony by repeating his immunized testimony as a witness in another trial) (Swygert, J.); *United States v. First Western State Bank of Minot*, 491 F.2d 780, 786 (8th Cir.), *cert. denied sub nom. Thompson v. United States*, 419 U.S. 825 (1974) ("The federal government, however, can use the same evidence testified to by defendants before the grand jury if it can demonstrate that the evidence to be used against defendants came from a legitimate source wholly independent of the compelled testimonies."); and *Miranti*, 253 F.2d at 138 (witnesses' refusal, on self-incrimination grounds, to verify before one grand jury statements made before a previous grand jury upheld because such verification could have been used as evidence against defendants).

As the above cases suggest, and as is stated in *Comment, Requiring Witnesses to Repeat Themselves*, 47 Tex. L.Rev. 266, 267 (1969), repetition of testimony in an independent proceeding may itself be viewed as incriminating. Thus, Conboy's deposition, even if it merely repeated or acknowledged his earlier testimony, could constitute an independent source of evidence against him.[14]

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[14] This conclusion is buttressed by the government's policy of seeking specific grants of immunity with respect to each proceeding at which a witness testifies. *See In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618, 626 (N.D.Ill.), *rev'd. on other grounds*, 609 F.2d 867 (7th Cir. 1979). This

(Footnote continued on following page)

But the district court reasoned, in a brief statement, that because Conboy testified earlier under immunity, he "cannot" be prosecuted for subsequent testimony based on the earlier testimony. The court, presumably relying on *Fleischacker* and *Starkey*, apparently concluded that the new deposition testimony would be inherently "tainted" by the previous grant of immunity and would thus, necessarily be inadmissible in any subsequent criminal proceeding.

B

The initial problem with the *Fleischacker* theory, that subsequent verification of previously immunized testimony is necessarily tainted, is that this theory focuses on the derivation of the deposition *questions* (derived from immunized testimony) rather than on the deposition *answers* (answered "now"). The answers, unlike the questions, are not "directly or indirectly derived" from the immunized grand jury or interview transcripts. Rather the answers are derived from the deponent's *current*, independent memory of events.

The misunderstanding of the nature of the answers leads to the next error in the *Fleischacker* theory, a misunderstanding of use immunity, such as given to Conboy. Both direct and indirect "use" of immunized testimony is prohibited. Direct use of previously immunized testimony would be exemplified by the introduction of that specific testimony in a subsequent proceeding. Indirect use would occur when a prosecutor has access to or is otherwise influenced by the immunized testimony and cannot prove, in a later criminal proceeding, that the evidence was derived without aid of the immunized testimony. But neither of these concepts applies to the potential situation before us. If Conboy answers the proposed questions, those answers necessarily create a *new* source of evidence. The new answers

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[14] *continued*
policy was evidenced by the separate and distinct grants of immunity provided to Conboy for his initial interview testimony and then for his grand jury testimony.

could then be used by a prosecutor because those specific answers were not derived from the previously immunized testimony—even though the questions, of course, were so derived.[15]

C

Another major problem with the *Fleischacker* theory, that subsequent testimony based on questions from previously immunized testimony is necessarily immunized, is that this theory results in improper de facto grants of immunity by courts. As the *Franey* court stated, "even if the court's finding that the witness' testimony would be 'derived' from immunized testimony were manifestly wrong, the court's order compelling the testimony would operate to immunize the testimony because of 'the well-established [exclusionary] rule . . . . .'" 620 F.2d at 1093.

In a curious footnote, the *Fleischacker* court conceded the very real danger of de facto immunity. That court acknowledged that the exclusionary rule does indeed result in de facto immunity; emphasized that the exclusionary rule was solely remedial and thus could not be used to justify a denial of the Fifth Amendment's protection; and then stated that conferral of de facto immunity was unauthorized. 644 F.2d at 78 n.13.[16] But the

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[15] Other general considerations also mandate the conclusion that deposition testimony is independent evidence. A civil action is clearly a proceeding which is separate and distinct from a grand jury investigation or subsequent criminal trial. Because civil discovery constitutes an independent stage of litigation, testimony given in discovery would be deemed an independent source of evidence. Thus, for example, one who has freely given non-immunized grand jury testimony may nonetheless assert the Fifth Amendment privilege in subsequent proceedings. *See, e.g., United States v. Cain*, 544 F.2d 1113, 1115 (1st Cir. 1976) (Justice Clark, sitting by designation); *United States v. Johnson*, 488 F.2d 1206, 1208 (1st Cir. 1973) *citing* 8 *Wigmore on Evidence* § 2276, 470-72 (McNaughton rev. 1961; Supp. 1972).

[16] The *Fleischacker* Court's discussion of this issue is as follows:

(Footnote continued on following page)

Fleischacker court reasoned that no de facto immunity would occur because it was convinced that the *answers* to a subsequent deposition would necessarily "derive from" the previous immunized testimony.

First, as discussed earlier, it does *not* follow that answers to subsequent testimony are necessarily "derived from" previously immunized testimony. Second, the *Fleischacker* reasoning bootstraps the critical question in issue. It assumes there will be no de facto grant of immunity because its analysis is "correct". But the critical feature of de facto immunity is that it occurs even when a court's analysis is "correct". If a court incorrectly determines that subsequent testimony was immunized, then it can and should remedy the error—i.e., the violation of the witness' Fifth Admendment privilege—through the exclusionary rule. But the key point is that, regardless of the correctness of the decision, as even the *Fleischacker* court seemed to admit in its footnote, the reliance on such a later remedy *necessarily* involves a prospective grant of improper de facto immunity.

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[16] *continued*

> Immunity is a creature of statute and as such can be conferred only in a manner consistent with its legislative design. . . . Section 6003 empowers the executive branch of the government to confer immunity upon a witness to compel testimony over an assertion of privilege; courts cannot confer immunity upon a witness on their own initiative. . . . *The discretion is placed in the executive branch, not in the judiciary.* . . . Nevertheless, where a "district court errs in making a ruling on privilege an after-the-fact exclusionary rule will apply to prevent the introduction of that evidence against the witness." . . . *Thus, the operation of the exclusionary rule results in a de facto grant of immunity.* But [sic] *"this exclusionary rule is solely remedial and cannot be used as a rationale to support a judicial decision which contravenes the fifth amendment's protection."* . . . . Though the protection afforded a witness by *de facto* immunity grants necessarily must be coextensive with grants of immunity obtained under the immunity statute, conferral of *de facto* immunity is nevertheless unauthorized.

644 F.2d at 78 n.13 (emphasis added) (citations omitted).

The impropriety of such immunity is clearly explained by the court in *Ellis v. United States*, 416 F.2d 791, 796 (D.D.C. 1969):

> A trial judge cannot reject a witness's claim of privilege merely on the ground that the ruling cannot hurt the witness because it will establish an immunity from subsequent prosecution.
>
> We are not here concerned with a case where a judge has made a mistake in applying legal rules, like a case where he erroneously rules that a witness has waived his privilege. In the case before us, the judge did not purport to deny that the witness had correctly presented a claim of privilege. He merely asserted that the witness would nevertheless be protected, by *Murphy*, against prosecution based on his testimony.
>
> The ruling was made by an able and conscientious trial judge. We are confident it was made in good faith, and can even discern how the judge may have come to a mis-reading of *Murphy*. *Nevertheless, his ruling was in the nature of a circular, self-fulfilling prophecy that in substance can only be viewed as a grant of immunity. That ruling was outside the scope of judicial authority.*

(emphasis added). *See In re Folding Carton Antitrust Litigation*, 465 F.Supp. 618, 628 (N.D.Ill. 1979), *rev'd on other grounds*, *Brown*, 609 F.2d 867. In denying Conboy's Fifth Amendment claims the district court made a prospective determination that Conboy's future deposition testimony would necessarily be tainted, and thus compelled his deposition testimony. This is precisely what a court cannot do. *Brown*, 609 F.2d at 872 n.11; *Ellis*, 416 F.2d at 796; *In re Folding Carton Antitrust Litigation*, 465 F.Supp. at 628.

To let stand the district court's order regarding Conboy's Fifth Amendment claims would improperly extend the power of the judiciary beyond its intended scope. The immunity statute specifically restricts the authority to initiate an immunity order to U.S. Attorneys, with the approval of the Attorney General. 18 U.S.C. § 6003.

A court has no power to issue immunity sua sponte; the power to grant immunity lies only with the Executive. *Ryan v. Commissioner*, 568 F.2d 531, 540 (7th Cir. 1978); *In re Daley*, 549 F.2d 469, 479 (7th Cir. 1977).

The district court, by compelling Conboy's deposition, has improperly expanded the narrow *use* immunity previously afforded by the government with regard to *criminal* proceedings into an order by which *civil* plaintiffs obtain testimony for their use in a totally different judicial proceeding. Compelling Conboy's testimony here would result in conferring upon private civil litigants the power to effect a grant of broad *transactional* immunity by intentionally violating a witness' Fifth Amendment rights.[17]

D

The foregoing problems in the *Fleischacker* immunity theory lead inexorably to the next, and perhaps most fundamental, flaw in that theory. The district court, in compelling Conboy's deposition testimony, is predicting that in a future criminal prosecution of Conboy, another court will agree with the district court's determination that the deposition testimony should be excluded. But, as we recognized in *Brown*, the exclusionary rule is

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[17] As the district court stated in *Folding Carton Litigation*, 465 F.Supp. at 629, *rev'd on other grounds*, *Brown*, 609 F.2d 867:

> Such an expansion of the witnesses' immunity would come at the plaintiffs' request, not the government's. Plaintiffs would essentially be in the position of granting immunity which is a result inconsistent with Congress' antitrust policy . . . and with congressional policy limiting the power to authorize grants of immunity to the Executive Branch. . . . Under circumstances where the witnesses have "a reasonable fear of prosecution," compelling the deposition testimony of these five witnesses would essentially constitute an impermissible transformation of the limited "use" immunity grant envisioned under § 6002 into a "transactional" immunity grant. . . .

(citations omitted).

remedial and cannot be used as a rationale to support a judicial decision which contravenes the Fifth Amendment's protection. 609 F.2d at 872 n.11.

No government prosecutor is a party to this litigation. There is no guarantee that, in a subsequent prosecution of Conboy, another court will agree with the district court's reasoning. It is simply not possible to assume that no subsequent court could *ever* admit the deposition testimony.

In summary, the district court's order places Conboy on the horns of the following dilemma. Either all courts must be bound by the determination that Conboy's deposition is tainted, or future courts are not bound by that determination. If all courts are bound, then the district court has improperly transformed statutory use immunity into de facto judicial transactional immunity. If future courts are not bound, Conboy's Fifth Amendment rights have not been supplanted with "coextensive" protection, as required by *Kastigar*. Rather, his Fifth Amendment rights will have been stripped away based on a tenuous prediction of future events. Constitutional rights are too vital to be sacrificed to such predictions.

V

In addition to the two broad issues of this case, whether Conboy faces any risk of prosecution and whether his deposition testimony is necessarily tainted, there are serious practical problems with ordering Conboy's deposition. First, if Conboy's answers at his deposition are even inconsistent with his earlier answers during the preliminary interview or at the grand jury interview, he could be subject to prosecution for perjury or giving false statements even without a specification in the indictment as to which answer is false. *See* 18 U.S.C. § 1623(c).

Recently, the Supreme Court has ruled that perjury prosecutions based on immunized testimony are permissible and that all statements made during the giving of immunized testimony, both true and false, may be admitted in the course of a subsequent perjury action if

such use was not otherwise prohibited by the Fifth Amendment. *United States v. Apfelbaum*, 445 U.S. 115, 123 (1980). Similarly, in *United States v. Housand*, 550 F.2d 818 (2d Cir. 1977), the court held that a witness, in precisely the situation confronting Conboy here, could claim his Fifth Amendment privilege and refuse to testify a second time on matters about which he had previously given immunized testimony, since an inconsistency might give rise to a perjury or false statements prosecution.[18]

Second, Conboy faces a serious problem of waiver. He and his counsel will have the heavy burden of ensuring that he does not stray even an inch beyond the four corners of the earlier transcripts. I realize that he and his counsel will have the transcripts before them, but emphasize that the burden of monitoring past and present testimony will be unduly onerous. For the slightest misstep—and questions may be strategically designed to induce such a misstep—could be fatal.

Moreover, it is well established that "[d]isclosure of a fact waives the privilege as to details." *Rogers v. United States*, 340 US. 367, 373 (1951). For example, in earlier testimony, Conboy may only have testified *that* certain price communications occurred. If he repeats this testimony in the civil deposition, he may be found, by another court, to have waived his Fifth Amendment privilege as to *details* of those communications to which he had not earlier testified. Such details may, in turn, provide investigative leads to incriminating matters totally un-

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[18] The *Housand* court stated:

> The Fifth Amendment privilege question arises when the witness refuses to answer on the ground that his *second* version of the event may result in his prosecution for perjury . . . . [T]he giving of truthful [but inconsistent] testimony on the second occasion could surely trigger investigation of whether the original testimony was false. . . . This is a reasonable cause for apprehension and supports the claim of privilege.

550 F.2d at 823.

touched in the earlier testimony. Thus, Conboy faces very real waiver problems.

VI

Finally, the district court order compelling Conboy's testimony may be unnecessary in any event inasmuch as Conboy's grand jury testimony would in most likelihood become admissible as the result of Conboy's assertion of his privilege against self-incrimination. Rule 804 of the Federal Rules of Evidence permits former testimony to be introduced if the "declarant is unavailable as a witness" and if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

First, a witness who asserts his privilege against self-incrimination is "unavailable." *United States v. Zurosky*, 614 F.2d 779, 792 (1st Cir. 1979); *Untied States v. Toney*, 599 F.2d 787, 789-90 (6th Cir. 1979); *Witham v. Mabry*, 596 F.2d 293, 297 (8th Cir. 1979); *United States v. Lang*, 589 F.2d 92, 95 (2d Cir. 1978).

Second, Conboy asserts and the plaintiffs do not deny, that at least some of the parties against whom the earlier testimony could be offered have had the opportunity to develop the immunized testimony by cross-examination in the prior criminal proceeding. It may be, however, that the "opportunity for cross-examination" aspect of Fed.R.Evid. 804(a) is inapplicable. For Conboy's Fifth Amendment privilege may have prevented any opportunity for cross-examination.

The "opportunity for cross-examination" objection may not resolve this situation because it is too broad. Plaintiffs have stated that they do not intend to ask any questions beyond those asked in the earlier transcripts. It is undisputed that Conboy has, and will exercise, his Fifth Amendment privilege to refuse to answer any such questions. Defendants will not, therefore, have any real opportunity to cross-examine at the deposition. In practical terms, there is no difference between a lack of opportunity for cross-examination at the grand jury and

before the Justice Department and the lack of opportunity for cross-examination at a new deposition. Thus, if the "opportunity for a cross-examination" objection would preclude admission of the prior transcripts, it would also preclude admission of the new deposition.

Although it is conceivable that the district court might not admit Conboy's grand jury testimony for some reason, in my view this risk is preferable to taking the risk that Conboy will never be prosecuted when there exists the possibility that he will be prosecuted.

VII

The critical question in this case is whether the fundamental Fifth Amendment protection against self-incrimination should be sacrificed to the plaintiffs' need for evidence in their civil litigation. The answer is that a plaintiff is only entitled to that evidence which is not otherwise protected. *Branzburg*, 408 U.S. at 688.

Recently, in *New Jersey v. Portash*, 440 U.S. 450 (1979), the Court reaffirmed the fundamental primacy of the Fifth Amendment. In *Portash*, the Court held that the Fifth Amendment prohibits the use of a witness' immunized grand jury testimony to impeach the trial testimony of that witness. Surely, if the interests of securing justice free of the taint of perjured testimony in a criminal trial are overridden by the dictates of the Fifth Amendment, the mere denial of certain discovery to civil plaintiffs, especially when the same testimony has been secured previously, should hardly allow any curtailment of the privilege against self-incrimination. Any inconvenience to the plaintiffs must pale in the face of denial of the fundamental right against self-incrimination.

In sum, we are asked to rely on too many uncertainties. The plaintiffs assue us that Conboy will not be prosecuted. But Conboy might be prosecuted. The plaintiffs assure us that the deposition testimony could never be used against Conboy. But that testimony might be used against him. And when he does testify, he might face the possibility of perjury or waiver.

In the face of these uncertainties, we should not conclude that Conboy's Fifth Amendment protections do not apply. I would reverse.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	)	
	)	MDL 310
THIS DOCUMENT RELATES TO ALL OPT-OUT CASES	)	

ORDER ADJUDGING JOHN A. CONBOY TO BE IN CIVIL CONTEMPT OF COURT

Opt out plaintiffs have made oral application pursuant to Title 28, § 1826, United States Code, for an order adjudging one John A. Conboy to be held in civil contempt of this court for his refusal, without lawful cause or excuse, to answer certain questions posed to him during the course of his oral deposition duly noticed and taken on Wednesday, May 20, 1981 in Chicago, Illinois. This court exercised the powers of a District Judge for the Seventh Circuit presiding over the taking of said deposition by telephone conference call pursuant to its discretion under Title 28, § 1407(b). The court presided rather than appoint a deposition judge because the matters to be examined are inextricably interwoven with the complex structure of this litigation as to make it extremely difficult for a judge unfamiliar with this case to preside. *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979), *In re Corrugated Container Antitrust Litigation, Appeal of Phillip Fleischacker*, Trade Reg. Rep. (CCH) ¶63,867 (2nd Cir. 1981).

John A. Conboy is a non-party witness who appeared pursuant to a subpoena issued in the Northern District of Illinois for this deposition. Mr. Conboy, on advice of counsel, has consistently refused to answer deposition questions as to his possible participation in an alleged

price-fixing conspiracy in the corrugated container industry on the grounds that such answers might tend to incriminate him. John A. Conboy had been an employee of Weyerhaeuser Corporation prior to December 21, 1975, the period in question. He is presently employed by Banner Personnel in Chicago, Illinois.

Mr. Conboy submitted to an interview by the Department of Justice in connection with a grand jury investigation of the corrugated industry. In connection with this interview, he was given a letter grant of immunity. Mr. Conboy also testified before the grand jury and this testimony was given subject to an oral grant of immunity read into the record. This grand jury investigation of the corrugated industry concluded with indictments in January of 1978. Clearly, Mr. Conboy cannot be prosecuted in either state or federal courts using the testimony thus elicited. *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

The federal statute of limitations is four years which indicates that Mr. Conboy would not be subject to federal prosecution for the period before December 31, 1975. Counsel for John A. Conboy stated that Mr. Conboy may be subject to prosecution in Ohio where there exists no applicable statute of limitations for antitrust violations. The court questioned Mr. Conboy as to whether he knew of any pending litigation related to the corrugated industry in the state of Ohio. Mr. Conboy answered that he has not been contacted to testify nor does he know of any such litigation in Ohio. Counsel for John A. Conboy did not present proof that any other applicable statute of limitations had not run.

The questions asked in said deposition were taken directly from certain interview transcripts of Mr. Conboy's testimony. Even after being compelled to answer said deposition questions by this court, Mr. Conboy has asserted his fifth amendment right and refused to answer.

THEREFORE, John A. Conboy having knowingly and willfully refused to obey said order which was made in

the presence of said John A. Conboy and his counsel while this court presided over said deposition through a telephone conference call on May 20, 1981, and good cause appearing therefor,

IT IS HEREBY ORDERED ADJUDGED, and DECREED that said John A. Conboy shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, § 1826, United States Code, and the Federal Rules of Civil Procedure, and that said John A. Conboy shall be and hereby is fined $5,000, and ordered to be remanded forthwith to the custody of the Attorney General of the United States to be confined at a suitable place for a period of six (6) months, or until such time that said John A. Conboy is willing to testify and answer the questions which this court has ordered him to answer, whichever period may be shorter; provided, however, that the period of such confinement of the said John A. Conboy shall not exceed the life of the above entitled litigation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, and DECREED that this order shall be stayed until 5:00 P.M. CST, June 3, 1981, and shall expire at that time unless said John A. Conboy shall have theretofore filed a notice of appeal from this order to the United States Court of Appeals, and shall expeditiously pursue it to completion, and in the event such notice of appeal is so filed, this stay shall be continued pending such appeal to the date that said court of appeals files its order or judgment respecting such appeal at which time this stay shall expire.

DONE at Houston, Texas, this 25 day of May, 1981.

/s/ _____

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
September 2, 1981

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

In re: CORRUGATED CONTAINER ANTITRUST LITIGATION,
No. 81-1960
APPEAL OF: JOHN CONBOY,

Deponent.

Appeal from the United States District Court for the Southern District of Texas, Houston Division.
No. MDL 310—John V. Singleton, *Judge.*

ORDER

The petition for rehearing *en banc* is granted.*

This appeal will be heard *en banc* at 2:00 p.m. on Thursday, September 10, 1981, in the Courtroom of the United States Court of Appeals, 219 South Dearborn Street, Room 2721, Chicago, Illinois. Oral argument will be limited to twenty (20) minutes per side.

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* Judge Cudahy disqualified himself from any consideration of the petition for rehearing *en banc*.

APPENDIX B

18 U.S.C. § 6001. Definitions

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Commodity Futures Trading Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, a United States bankrupcty court established under chapter 6, title 28, United States

Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Court of International Trade, and the Court of Military Appeals.

Added Pub.L. 91—452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 926, and amended Pub.L. 95—405, § 25, Sept. 30, 1978, 92 Stat. 877; Pub.L. 95—598, Title III, § 314(*l*), Nov. 6, 1978, 92 Stat. 2678; Pub.L. 96—417, Title VI, § 601(1), Oct. 10, 1980, 94 Stat. 1744.

18 U.S.C. § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub.L. 91—452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

18 U.S.C. § 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United Sates, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91—452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

18 U.S.C. § 6004. Certain administrative proceedings

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) An agency of the United states may issue an order under subsection (a) of this section only if in its judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91—452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

18 U.S.C. § 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee, and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

Added Pub.L. 91—452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 928.

Joint Appendix

Office - Supreme Court, U.S.
FILED
FEB 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PILLSBURY COMPANY, ET AL.,

Petitioners,

vs.

JOHN A. CONBOY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

FRANCIS J. McCONNELL
McCONNELL, RUBERRY & JANSEN
135 South LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131
Attorney for Petitioners

MICHAEL W. COFFIELD
KEVIN M. FLYNN
COFFIELD, UNGARETTI, HARRIS & SLAVIN
Three First National Plaza
Suite 3500
Chicago, Illinois 60602
(312) 977-4400
Attorneys for Respondent

PETITION FOR CERTIORARI FILED OCTOBER 30, 1981
CERTIORARI GRANTED JANUARY 11, 1982

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The Panel Opinion of the United States Court of Appeals for the Seventh Circuit is included in the Petition for Certiorari at Appendix A, pages 31a-67a.

The *En Banc* Opinion of the United States Court of Appeals for the Seventh Circuit is included in the Petition for Certiorari at Appendix A, pages 1a-30a.

The Memorandum Opinion of the United States District Court, Southern District of Texas, is included in the Petition for Certiorari at Appendix A, pages 68a-70a.

18 United States Code, Sections 6001-6005 are included in the Petition for Certiorari at Appendix B, pages 72a-76a.

In The

Supreme Court of the United States

October Term, 1981

THE PILLSBURY COMPANY, ET AL.,

Petitioners,

vs.

JOHN A. CONBOY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Relevant Docket Entries In The United States District Court For The Southern District Of Texas

April 27, 1981—

Deposition Subpoena Issued by U. S. District Court (N.D. Ill.).

June 3, 1981—

Transcript of Proceedings, John A. Conboy Deposition (May 20, 1981), including Deposition Exhibits.

May 26, 1981—

Order Adjudging John A. Conboy To Be In Civil Contempt Of Court.

June 3, 1981—

Notice Of Appeal To The Fifth Circuit Court of Appeals.

Relevant Docket Entries In The United States Court Of Appeals For The Fifth Circuit

June 8, 1981—

Notice Of Appeal To The Fifth Circuit Court of Appeals.

June 8, 1981—

Joint Motion To Transfer Matter To The Seventh Circuit Court of Appeals.

Relevant Docket Entries In The United States Court Of Appeals For The Seventh Circuit

June 23, 1981—

Order Setting Forth Briefing Schedule.

July 17, 1981—

Judgment Order.

July 31, 1981—

Petition For Rehearing And Suggestion For *En Banc* Consideration Of Deponent-Appellant John A. Conboy.

September 2, 1981—

Order Granting Petition For Rehearing *En Banc*.

October 16, 1981—

En Banc Judgment Order.

October 30, 1981—

Motion For Stay Of Mandate.

November 4, 1981—

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

November 9, 1981—

Order Granting Motion For Stay Of Mandate.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	MDL 310
THIS DOCUMENT RELATES TO ALL OPT-OUT CASES	

ORDER ADJUDGING JOHN A. CONBOY TO BE IN CIVIL CONTEMPT OF COURT

Opt out plaintiffs have made oral application pursuant to Title 28, § 1826, United States Code, for an order adjudging one John A. Conboy to be held in civil contempt of this court for his refusal, without lawful cause or excuse, to answer certain questions posed to him during the course of his oral deposition duly noticed and taken on Wednesday, May 20, 1981 in Chicago, Illinois. This court exercised the powers of a District Judge for the Seventh Circuit presiding over the taking of said deposition by telephone conference call pursuant to its discretion under Title 28, § 1407(b). The court presided rather than appoint a deposition judge because the matters to be examined are inextricably interwoven with the complex structure of this litigation as to make it extremely difficult for a judge unfamiliar with this case to preside. *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979), *In re Corrugated Container Antitrust Litigation, Appeal of*

Phillip Fleischacker, Trade Reg. Rep. (CCH) ¶63,867 (2nd Cir. 1981).

John A. Conboy is a non-party witness who appeared pursuant to a subpoena issued in the Northern District of Illinois for this deposition. Mr. Conboy, on advice of counsel, has consistently refused to answer deposition questions as to his possible participation in an alleged price-fixing conspiracy in the corrugated container industry on the grounds that such answers might tend to incriminate him. John A. Conboy had been an employee of Weyerhauser Corporation prior to December 21, 1975, the period in question. He is presently employed by Banner Personnel in Chicago, Illinois.

Mr. Conboy submitted to an interview by the Department of Justice in connection with a grand jury investigation of the corrugated industry. In connection with this interview, he was given a letter grant of immunity. Mr. Conboy also testified before the grand jury and this testimony was given subject to an oral grant of immunity read into the record. This grand jury investigation of the corrugated industry concluded with indictments in January of 1978. Clearly, Mr. Conboy cannot be prosecuted in either state or federal courts using the testimony thus elicited. *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

The federal statute of limitations is four years which indicates that Mr. Conboy would not be subject to federal prosecution for the period before December 31, 1975. Counsel for John A. Conboy stated that Mr. Conboy may be subject to prosecution in Ohio where there exists no applicable statute of limitations for antitrust violations. The court questioned Mr. Conboy as to whether he knew of any pending litigation related to the

corrugated industry in the state of Ohio. Mr. Conboy answered that he has not been contacted to testify nor does he know of any such litigation in Ohio. Counsel for John A. Conboy did not present proof that any other applicable statute of limitations had not run.

The questions asked in said deposition were taken directly from certain interview transcripts of Mr. Conboy's testimony. Even after being compelled to answer said deposition questions by this court, Mr. Conboy has asserted his fifth amendment right and refused to answer.

THEREFORE, John A. Conboy having knowingly and willfully refused to obey said order which was made in the presence of said John A. Conboy and his counsel while this court presided over said deposition through a telephone conference call on May 20, 1981, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that said John A. Conboy shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, § 1826, United States Code, and the Federal Rules of Civil Procedure, and that said John A. Conboy shall be and hereby is fined $5,000, and ordered to be remanded forthwith to the custody of the Attorney General of the United States to be confined at a suitable place for a period of six (6) months, or until such time that said John A. Conboy is willing to testify and answer the questions which this court has ordered him to answer, whichever period may be shorter; provided, however, that the period of such confinement of the said John A. Conboy shall not exceed the life of the above entitled litigation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, and DECREED that this order shall be stayed until 5:00 P.M. CST, June 3, 1981, and shall expire at that time unless said John A. Conboy shall have theretofore filed a notice of appeal from this order to the United States Court of Appeals, and shall expeditiously pursue it to completion, and in the event such notice of appeal is so filed, this stay shall be continued pending such appeal to the date that said court of appeals files its order or judgment respecting such appeal at which time this stay shall expire.

DONE at Houston, Texas, this ..... day of May, 1981.

/s/ John V. Singleton
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

* * (Caption No. M.D.L. 310) * *

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that John A. Conboy, a non-party deponent, hereby appeals, pursuant to 28 U.S.C. §1291, to the United States Court of Appeals for the Seventh Circuit from the Order Adjudging John A. Conboy in Civil Contempt of Court pursuant to 28 U.S.C. §1826 entered in this action by the Honorable John V. Singleton on May 22, 1981.

June 3, 1981

/s/ Kevin M. Flynn
One of the Attorneys for
John A. Conboy

Of Counsel:
Michael W. Coffield
Kevin M. Flynn
COFFIELD UNGARETTI HARRIS & SLAVIN
30 North LaSalle Street
Suite 3200
Chicago, Illinois 60602
(312) 977-4400

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	
	MDL 310
	Appeal of John A. Conboy, Deponent.
THIS DOCUMENT RELATES TO OPT-OUT CASES	

JOINT MOTION TO TRANSFER MATTER TO THE SEVENTH CIRCUIT COURT OF APPEALS

Appellant, John A. Conboy, and Appellees, Opt-Out Plaintiffs, by and through their respective counsel, and pursuant to Rule 27(b) of the Federal Rules of Appellate Procedure and Rule 10.1 of the Rules of this Court, jointly move this Court for the entry of an Order directing the Clerk of this Court to transmit all records submitted to this Court by the Clerk of the District Court for the Southern District of Texas in connection with this appeal to the United States Court of Appeals for the Seventh Circuit, and in support of this motion state as follows:

1. John A. Conboy, a non-party deponent, is appealing from an Order adjudging him in contempt of court entered in MDL 310 by the Honorable John V. Singleton on May 22, 1981 during the course of Mr. Conboy's oral deposition in Chicago, Illinois taken pursuant to a subpoena issued from the United States District Court for the Northern District of Illinois.

2. Judge Singleton's order holding Mr. Conboy in contempt of court states that the contempt order was rendered by Judge Singleton while exercising "the powers of a District Judge for the Seventh Circuit presiding over the taking of said deposition by telephone conference call pursuant to its discretion under Title 28, Sec. 1407(b)." A copy of Judge Singleton's Contempt Order from which Mr. Conboy appeals is attached hereto as Exhibit "A".

3. Appellant and Appellees interpret this Court's decisions in *In Re Corrugated Container Antitrust Litigation, Appeal of Fleishaker* ("Fleishaker") (*sic*), 620 F.2d 1086 (5th Cir. 1980) and its recent decision in *In Re Corrugated Container Antitrust Litigation, Appeal of John W. Culy* ("Culy"), No. 81-2145 (5th Cir. May 22, 1981), as controlling this appeal and that such precedent compels the conclusion that this Court lacks jurisdiction over this appeal.*

4. Accordingly, on June 3, 1981, Appellant filed with the Clerk of the United States District Court for the Southern District of Texas its Notice of Appeal to the Seventh Circuit Court of Appeals and requested that said Clerk transmit the Notice of Appeal together with the Designated Record on Appeal to the Seventh Circuit for docketing with that Court. A copy of Appellant's counsel's transmittal letter to the District Court Clerk is attached hereto as Exhibit "B".

5. Appellant and Appellees are advised that leave of this Court is required for transmission of records from

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* Although Appellant concurs with Appellees for purposes of this motion that the *Fleishaker* (*sic*) and *Culy* decisions ostensibly preclude this Court from assuming jurisdiction over this appeal, Appellant expresses no opinion as to the correctness of this Court's determination in these prior decisions concerning its jurisdiction over those appeals.

this Court to another circuit court of appeals. Due to the procedural nature of this motion and the stipulation of all parties possibly affected thereby, Appellant and Appellees request that this motion be acted upon without awaiting a response thereto, pursuant to Rule 27(b) of the Federal Rules of Appellate Procedure and Rule 10.1 of the Rules of this Court.

WHEREFORE, Appellant John A. Conboy and Appellees Opt-Out Plaintiffs, by and through their respective counsel, respectfully request that this Court enter the attached Order directing the Clerk of this Court to transmit all records submitted to this Court by the Clerk of the District Court in connection with this appeal to the Seventh Circuit Court of Appeals for docketing of this appeal with that court.

Dated: June 4, 1981

Respectfully submitted,

/s/ Kevin M. Flynn
One of the Attorneys for
Appellant, John A. Conboy

OF COUNSEL:

Michael W. Coffield
Kevin M. Flynn
COFFIELD UNGARETTI HARRIS & SLAVIN
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400

/s/ _____
One of the Attorneys for
Appellees, Opt-Out Plaintiffs

OF COUNSEL:

McCONNELL & CAMPBELL
135 South LaSalle Street
Chicago, Illinois 60603
(312) 726-9131

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 81-2226

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION.
JOHN A. CONBOY,

Deponent-Appellant,

versus

ANCHOR HOCKING CORPORATION, ET AL.,

Opt-Out Plaintiffs-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges

BY THE COURT:

IT IS ORDERED that the joint motion of the parties, to transfer the referenced cause to the United States Court of Appeals for the Seventh Circuit is granted.

APPEARANCE FORM
UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
Cause No. 81-1960

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION.
APPEAL OF: JOHN CONBOY,

Deponent.

The Clerk will enter appearance as counsel for John Conboy, Deponent-Appellant

/s/ Michael W. Coffield
Michael W. Coffield
Coffield Ungaretti Harris & Slavin
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400

/s/ Kevin M. Flynn
Kevin M. Flynn
Coffield Ungaretti Harris & Slavin
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400

* * *

(Letterhead Of)

UNITED STATES
DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
DALLAS OFFICE
1100 COMMERCE STREET ROOM 8C6
DALLAS, TEXAS 75242

January 10, 1978

Mr. John Conboy
535 N. Michigan
Chicago, IL

Dear Mr. Conboy:

Recent conversations between your attorney, Mr. Mike Coffield and Mr. Ed Novak, and representatives of this Office have resulted in an agreement that you will provide this Office information in connection with an investigation into the corrugated container industry in lieu of an appearance before the grand jury conducting this investigation. It is understood that you will submit to an interview by members of this Office, during which you will be questioned under oath as if before the grand jury, with the further understanding that the information you reveal will be reduced to a verbatim transcript. It is also understood that you will provide this Office with the originals of certain personal documents which you possess. This Office will review those documents prior to your interview. To the extent that the documents are deemed relevant to the investigation, we shall retain the originals under the same terms as documents submitted to the grand jury. Any documents not deemed relevant shall be returned to you.

Specifically, you will be questioned thoroughly and extensively about your knowledge of the corrugated container industry, the pricing of corrugated boxes, and about the personal documents which you will turn over to this Office pursuant to subpoena. It is a material con-

dition of this agreement that you give full, accurate and complete answers to the questions asked of you, and you should understand that any withholding of information, or the giving of any false or misleading statement may subject you to criminal penalties.

For our part, you have our assurance that the information which you reveal in the course of the interview and the transcript derived therefrom, along with the personal documents which you deliver to us, will be given the same treatment and protections afforded statements made before a grand jury pursuant to a court order compelling testimony and granting immunity. Therefore, you have our commitment that none of the information which you provide this Office, including information obtained from your personal documents, pursuant to this agreement nor any information directly or indirectly derived therefrom will be used against you in this or any subsequent proceeding with the above-mentioned exception relating to the giving of false or misleading information.

/s/ J. Albert Kroemer
Attorney
Antitrust Division

ACKNOWLEDGED: /s/ John Conboy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

In Re Grand Jury Proceedings) Grand Jury No. 76-3

ORDER

Upon the application of the United States Attorney for the Southern District of Texas for an order to require testimony of a witness before the grand jury pursuant to the Organized Crime Control Act of 1970, 18 U.S.C. § 6001 *et seq.*, and it being represented by the government that Deputy Assistant Attorney General of the United States Hugh P. Morrison, Jr., has approved this application, it being the judgment of the United States Attorney and the Deputy Assistant Attorney General that the testimony from John A. Conboy may be necessary to the public interest; and that such individual is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination;

THEREFORE, IT IS HEREBY ORDERED THAT: In accordance with the Organized Crime Control Act of 1970, 18 U.S.C. § 6001 *et seq.*, John A. Conboy give testimony or provide other information before the grand jury, and that any testimony given by John A. Conboy pursuant to this Order shall be subject to the immunity provisions of the Organized Crime Control Act of 1970 as provided in 18 U.S.C. § 6002.

Dated:

/s/ Woodrow Seals
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

* * (Caption No. MDL 310) * *

TO John Conboy
c/o Mr. Kevin Flynn
Coffield, Ungaretti Harris & Slavin
30 N. LaSalle, Room 3200
Chicago, IL 60602

YOU ARE COMMANDED to appear at the offices of McConnell & Campbell, 135 South LaSalle Street, Suite 4310 in the city of Chicago on the 20 and 21 day May, 1981, at 9:30 o'clock A.M. to testify on behalf of opt-out plaintiffs at the taking of a deposition in the above entitled action pending in the United States District Court for the Southern District of Texas and bring with you the documents described on the attached Schedule A.

Dated April 27, 1981

H. STUART CUNNINGHAM
Clerk.

By /s/ _____
Deputy Clerk.

/s/ Edward F. Ruberry
Attorney for
Opt-Out Plaintiffs
McConnell & Campbell
135 South LaSalle Street
Chicago, IL 60603

Any subpoenaed organization not a party to this suit is hereby admonished pursuant to Rule 30 (b) (6), Federal Rules of Civil Procedure, to file a designation with the court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and shall set forth, for each person designated, the matters on which he will testify or produce documents or things. The persons so designated shall testify as to matters known or reasonably available to the organization.

* * *

(Return On Service omitted in printing.)

ACCEPTANCE OF SERVICE

Kevin Flynn, of Coffield, Ungaretti, Harris & Slavin, attorneys of record for John Conboy, hereby accept service of Deposition Subpoena on behalf of John Conboy, a former employee of Weyerhaeuser Company.

/s/ Kevin M. Flynn
One of the Attorneys of
Record for John Conboy

Coffield, Ungaretti, Harris & Slavin
30 North LaSalle Street
Suite 3200
Chicago, IL 60602

SCHEDULE A

1. Each transcript, sound recording, summary, abstract or report of testimony before a grand jury or an interview in connection with a grand jury proceeding relating to the sale of corrugated containers or sheets.

2. Each document produced by you or on your behalf to any grand jury or any agent of the federal government in connection with an investigation pertaining to corrugated containers or sheets.

3. Each document which relates to or constitutes a record of the exchange or communication of current or historical pricing information, current or historical quotations, present or prospective pricing policies or guidelines between or among sellers of corrugated containers or sheets.

4. Each document which relates to or constitutes the exchange or communication of cost information relating to corrugated containers or sheets between or among producers of corrugated containers or sheets.

5. Each diary or other record of appointments or meetings maintained while you were employed by a manufacturer of corrugated containers.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 2, 1981.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

In re: CORRUGATED CONTAINER ANTITRUST LITIGATION,
No. 81-1960
APPEAL OF: JOHN CONBOY,

Deponent.

Appeal from the United States District Court for the Southern District of Texas, Houston Division.
No. MDL 310, John V. Singleton, *Judge.*

ORDER

The petition for rehearing *en banc* is granted.*

This appeal will be heard *en banc* at 2:00 p.m. on Thursday, September 10, 1981, in the Courtroom of the United States Court of Appeals, 219 South Dearborn Street, Room 2721, Chicago, Illinois, Oral argument will be limited to twenty (20) minutes per side.

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* Judge Cudahy disqualified himself from any consideration of the petition for rehearing *en banc.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

* * (Caption No. MDL 310) * *

The deposition of John Conboy, called by the Plaintiffs for examination, pursuant to notice and pursuant to the Federal Rules of Civil Procedure for the United States District Courts, pertaining to the taking of depositions, taken before Nancy Ann Bellino, Certified Shorthand Reporter and Notary Public within and for the County of Cook and State of Illinois, at 135 South LaSalle Street, Chicago, Illinois, on the 20th day of May, A.D., 1981.

[2]* Appearances:

Messrs. McConnell & Campbell, by
Mr. Francis J. McConnell and
Mr. Edward F. Ruberry,
Appearing on behalf of all Opt-Out Plaintiffs;

Messrs. Coffield, Ungaretti, Harris & Slavin, by
Mr. Kevin M. Flynn,
Appearing on behalf of the witness, Mr. John Conboy;

Messrs. Kirkland & Ellis, by
Mr. Jeffery M. Cross,
Appearing on behalf of the Defendant, Weyerhaeuser Company.

---

* Numbers in brackets signify the page of the deposition transcript where the material appearing below the number can be located.

[4] Mr. McConnell: Let the record show that this deposition is being taken pursuant to the Federal Rules of Civil Procedure and Notice.

(Witness duly sworn.)

JOHN CONBOY, called as a witness, having been first duly sworn on oath, was examined and testified as follows:

Direct Examination by Mr. McConnell.

Q. Would you state your full name, please?
A. John Conboy.
Q. And what is your present residence address?
A. 535 North Michigan Avenue.
Q. Chicago?
A. 60611.
Q. Are you appearing here today pursuant to Subpoena?
A. Yes, I am.
[5] Q. Do you have a copy of the Subpoena with you?
A. I do not.
Q. By whom are you presently employed?
A. Banner Personnel.
Q. And where are they located, Mr. Conboy?
A. 17 West Madison, Suite 1100.
Q. And what is the nature of your employment with them?
A. I am a Personnel Consultant. We are a personnel placement agency.
Q. Now, were you at 1 time employed by the Defendant, Weyerhaeuser Company?
A. I was.
Q. And what were the inclusive dates of your employment by that company?
A. I believe it was from April 16, 1952, to March 31, 1980.

Q. And were you employed by Weyerhaeuser as National Account Salesman at 1 time?

A. Yes.

Q. And what were the inclusive dates that [6] you were National Account Salesman?

A. From mid-'75 to the 1980 date.

Q. And for the period 1971 to 1975, were you employed as Marketing Coordinator for the Central Region of the Container Division of Weyerhaeuser?

A. I was.

Q. And as Marketing Coordinator, did you report to Robert McNaughton?

A. I was.

Q. You did?

A. I did.

Q. And was Mr. McNaughton's position and title at that time Central Region Manager?

A. That's right.

Q. And that also was for the Container Division; is that right?

A. Yes.

Q. And as Marketing Coordinator, did you oversee or coordinate sales activities for Weyerhaeuser's corrugated plants in Mt. Vernon, Ohio; Detroit, Michigan; Three Rivers, Michigan; [7] Rockford, Illinois; and for a portion of that time, Columbus, Indiana?

Mr. Cross: Miss Reporter, can I hear that question reread?

(Whereupon, the last question was read back by the court reporter.)

The Witness: I did.

Mr. McConnell: Q. Now, did you give, under oath, an interview statement on January 10, 1978?

Mr. Flynn: I'd object to that question. It intends to elicit information protected from disclosure pursuant to

Rule 6(e) of the Federal Rules of Criminal Procedure; and I instruct the witness to take the 5th at this time.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and [8] my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. Was the place of the statement at the offices of the Department of Justice, Antitrust Division in Dallas, Texas?

Mr. Flynn: Same objection.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. Flynn: Mr. McConnell, if we could stipulate at this point that in the event that Mr. Conboy asserts his 5th Amendment to any other questions, if he could simply respond, "I assert the 5th," and that will be understood by the court reporter that the entire assertion as previously given will be transcribed in the record?

Mr. McConnell: Yes, that's agreeable.

[9] Q. Was the interview statement in connection with the Grand Jury investigation of the corrugated container industry?

Mr. Flynn: Same objection.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Would you mark this Conboy Exhibit 1 for identification?

(Whereupon, Conboy Exhibit No. 1 was marked for identification.)

Mr. McConnell: Q. I show you what has been marked Conboy Exhibit No. 1 for identification and ask you if you can identify that as a true and correct copy of your government interview statement at the offices of the United States Department of Justice, Antitrust Division, [10] in the City of Dallas, State of Texas, on January 10, 1978?

Mr. Flynn: Again, Mr. McConnell, I would object to efforts to elicit information concerning the Grand Jury interview statement based upon the objection previously interposed.

Furthermore, it would be impractical at this point for Mr. Conboy to review the document marked as Exhibit No. 1 in an effort to attest to its accuracy, as that would require a review of the entire transcript.

I would be willing to stipulate at this point that any questions concerning Mr. Conboy's Grand Jury testimony would not be responded to, and we would have to assert the 5th Amendment concerning any further inquiries concerning his Grand Jury testimony.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by [11] the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. Cross: Mr. McConnell, may I examine Plaintiff's Exhibit No. 1 for identification?

Mr. McConnell: Yes.

Q. Were the answers you gave in the interview transcript true and correct?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. Did you also appear before the Corrugated Container Grand Jury on January 18, 1978?

Mr. Flynn: Same objection.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against [12] self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. And was the place of your Grand Jury testimony Houston, Texas?

Mr. Flynn: Same objection.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Would you mark this Conboy Exhibit 2 for identification?

(Whereupon, Conboy Exhibit No. 2 was marked for identification.)

Mr. McConnell: Q. I show you what has been marked Conboy Exhibit 2 for identification and ask you if you can identify that as a true [13] and correct copy of your Grand Jury transcript?

Mr. Flynn: Same objection with regard to Exhibit No. 2. It intends to elicit information in contravention of the Grand Jury Secrecy Provisions of Rule 6(e) of the Federal Rules of Criminal Procedure.

Additionally, it would simply be practically impossible for Mr. Conboy to attest to the accuracy of a document that appears to be approximately 47 pages long.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. Were the answers you gave before the Houston Corrugated Grand Jury truthful?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question [14] based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. Was the testimony which you gave, both in your interview statement and in your appearance before the Grand Jury, pursuant to a grant of use immunity?

Mr. Flynn: You can answer that question.

The Witness: Yes, it was.

Mr. McConnell: Q. Were you represented by counsel both at the time of your interview statement and at the time of your appearance before the Grand Jury?

A. Yes, I was.

Q. Do you have a copy of your interview statement today?

A. No, I do not.

Q. Do you have a copy of your Grand Jury transcript?

[15] A. No, I do not.

Q. Who, other than yourself, has seen a copy of your government interview statement, to your knowledge?

A. Only my Counsel.

Q. And is that Mr. Kevin Flynn?

A. Yes.

Q. And who, other than yourself, has seen a copy of your Grand Jury transcript, to your knowledge?

A. Only my Counsel, Kevin Flynn.

Mr. Flynn: I might state for the record at this point, as a point of clarification, that I advised Mr. Conboy that I was informed by Mr. Ruberry that Opt-Out Plaintiffs have been provided with both a transcript of the interview and the live Grand Jury testimony, and that that was the first information that I had that the Opt-Out Plaintiffs had been provided that testimony.

Mr. McConnell: Q. When did you last look at your interview statement, [16] approximately?

A. I would say immediately upon receipt, sometime in the spring of 1978.

Q. And have you reviewed it since?

A. No, I have not got a copy.

Q. And when did you last review your Grand Jury transcript?

A. Early in 1978.

Q. And have you reviewed it since?

A. No, I have not.

Q. Is your memory of dates, people, companies and events which were the subject of your interview statement and later your Grand Jury testimony as fresh today as it was at the time you gave the statement and the testimony in 1978?

Mr. Flynn: If I could just, Mr. McConnell, respectfully suggest that it might be impossible for Mr. Conboy to provide a general response to whether his recollection of the entire testimony that he may have provided the Grand Jury is the same—the recollection [17] of that testimony is the same today as it was at the time. If you could narrow it down to specific information, it might

be more helpful; but I will allow Mr. Conboy to respond to the question, if he can.

The Witness: I really don't know.

Mr. McConnell: Q. Mr. Conboy, I am going to ask you a series of questions which track your interview statement, and I will ask you and your Counsel to follow along with me starting at Page 65.

Before I do that, let me ask you several general questions. Taking only the period of time prior to January, 1975, during the time that you were Marketing Coordinator for the Central Region, did you ever discuss with competitors prices you were charging or going to charge or going to quote to corrugated customers with other corrugated manufacturers?

Mr. Flynn: I object to the form of the question. It employs vague and ambiguous terms not established in this deposition.

[18] The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. Is it not a fact that during the 1971-'74 period, you exchanged prices to be charged or quoted specific corrugated customers with other corrugated manufacturers?

Mr. Flynn: Same objection to the form of the question.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. Is it not a fact [19] that during the 1971-'74 period, you exchanged prices to be charged or quoted to corrugated customers for corrugated containers or sheets with other corrugated manufacturers including, among others, Packaging Corporation of America, Alton, Container Corporation of America, Continental Can, Downing Box, Green Bay, Hoerner-Waldorf, Bell Fibre, Inland, International Paper, Mead, Owens-Illinois, St. Joe, St. Regis, Stone Container, Union Camp, Western Kraft, Westvaco, Olinkraft, Southwest Forest, Menasha, and Hankins, later acquired by Macmillan Bloedel?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. Cross: I'd like to object to the form of the question as containing ambiguous and undefined terms.

[20] Mr. Flynn: Also, it is compound and encyclopedic in its scope and seeks a legal conclusion from the witness, I might add.

Mr. McConnell: Q. Now, referring to the government interview statement, Conboy Exhibit 1, starting with page 65, "Who did you have price communications with at Alton Box Board?"

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. Is it not the fact that you had price communications with Fred Renshaw and Dick Herman—

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under [21] the 14th Amendment to the United States Constitution.

Q. —at Alton Box Board? I hadn't finished the question.

Mr. Flynn: If you could, allow Mr. McConnell to finish the question, and then allow me an opportunity to make an objection.

I object to the form of the question. It assumes facts not in evidence. Also, in that regard, the record should reflect that Mr. McConnell appears to be at least referring to Conboy Exhibit No. 1 in forming these questions, and to the extent that he is relying on Exhibit No. 1 to fashion his questions, I'd object to the questions in that it appears to be based upon information protected from disclosure pursuant to the Grand Jury Secrecy Provision of Federal Rule of Criminal Procedure 6(e).

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by [22] the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Well, I don't agree with your statement about the matter being protected from disclosure, but I do agree that I am referring to and reading from and tracking verbatim the government interview statement by Mr. Conboy.

Mr. Cross: For the record, I'd like to ask you to clarify the question with what time frame you are placing this question and the previous question. Any time during the period of the Complaint in this case?

Mr. McConnell: No.

Q. Unless I otherwise indicate, Mr. Conboy, all of my questions are limited to the period prior to January, 1975.

Did you not so testify in your government interview statement of January 10, 1978?

Mr. Flynn: Same objection as [23] previously interposed.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. Do you recall when these communications were with Mr. Renshaw?

Mr. Flynn: Objection, no foundation.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. I am now referring to Page 66. Is it not the fact that your communications with Mr. Renshaw were during the period from 1968 through about 1972, and then [24] after that all calls were directed to Dick Herman?

Mr. Flynn: Same objections.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. Did you not so testify in your government interview statement on January 10, 1978?

Mr. Flynn: Same objections.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. What was the nature [25] of your conversations with Mr. Renshaw?

Mr. Flynn: Same objections.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. Flynn: If I could, Mr. McConnell, just have a continuing objection both as to lack of foundation as well as my objection to the use of the Grand Jury testimony?

Mr. McConnell: Yes.

Mr. Flynn: Thank you.

Mr. McConnell: Q. Is it not the fact that your conversations with Mr. Renshaw involved a discussion of price on specific pieces of business?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination [26] accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. And did you not so testify in your government interview statement?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. Would that have been specific prices for specific items, or general percentage of increase?

Mr. Cross: I object to the form of the question. Jack, I'm afraid I'm lost as to what the "that's" are referring to.

Mr. McConnell: The discussion of price.

Mr. Cross: Miss Reporter, could you [27] repeat the question, please?

(Whereupon, the last question was read back by the court reporter.)

Mr. Cross: I am still confused. Are you talking about his conversations with Mr. Renshaw?

Mr. McConnell: Yes.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. And is it not the fact that those discussions of price with Mr. Renshaw would have been both discussions of specific prices for specific items or a general percentage of increase?

Mr. Cross: I object to the form of the question.

[28] The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. And did you not so testify in your government interview statement?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. Referring again to your conversations with Mr. Renshaw, was this a 2-way communication where he called you and you called him?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-inerimination [29] accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. Is it not the fact that it was a 2-way communication where you called him and he called you?

Mr. Cross: I object to the form of the question. You are saying it was a 2-way conversation. I believe that question is vague and ambiguous.

Mr. McConnell: Q. Well, is it not the fact that these communications were 2-way, that you called him and he called you?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. And did you not so testify in your [30] government interview statement?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege

against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. And once you got this information, what would you do with it?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. Is it not the fact that you used it for a basis of pricing the piece of business that was under discussion?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question [31] based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. And did you not so testify in your government interview statement?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. Would your prices be at or above his prices, referring to Alton's prices? And I am at Page 68 of the transcript.

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my

rights [32] under the 14th Amendment to the United States Constitution.

Q. Is it not the fact that you would price slightly above or slightly below the Alton prices?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Q. And did you not so testify in your government interview statement?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. Flynn: For the record, I'd like [33] to state an objection to the form of those questions. I believe they are vague, ambiguous; and I don't know whether they are referring to specific instances and specific prices or prices in general.

Mr. McConnell: Q. Would this be, in your estimation, honoring his market or honoring his prices?

Mr. Flynn: In addition to my continuing objection with regard to lack of foundation, form and improper use of information protected from disclosure under the Grand Jury Secrecy Provisions, we are now employing totally vague and ambiguous terms; and apparently you are asking this lay witness to reach a legal conclusion with regard to the effect of certain activity or alleged activity.

Mr. Cross: I would also like to object for the record. The form of the question is vague, ambiguous and uses

undefined and ambiguous terms such as "honoring his market" and "honoring his prices"; and reference to this [34] is vague and ambiguous. It doesn't have proper antecedents.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Q. And is it not a fact that quoting prices slightly above or slightly below Alton's prices would be honoring his market or honoring his prices?

Mr. Flynn: Same objections as previously interposed.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

[35] Mr. McConnell: Q. And did you not so testify in your government interview statement?

A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

Mr. McConnell: Now, Mr. Flynn, if I were to ask similar questions involving pricing activities of this witness during the period prior to January, 1975, with respect to other corrugated manufacturers mentioned in his government interview statement and other people mentioned, which questions track the government interview questions, will you stipulate that the witness will continue to invoke his 5th Amendment privilege?

Mr. Flynn: Yes, I would advise Mr. Conboy to continue to assert the 5th [36] Amendment with regard to questions of that matter, and I would also stipulate that I would continue to interpose the objections that I have made up to this point of the deposition concerning those questions.

Mr. Cross: Just for clarification, Jack, what do you mean when you say "track"? You mean word for word, verbatim?

Mr. McConnell: Verbatim or as close as I can get to verbatim grammatically.

At this time I am going to suspend the deposition so that we can call Judge Singleton and ask for a ruling on a Motion to Compel the witness to testify over his 5th Amendment claim.

Mr. Cross: Off the record.

(Whereupon, a discussion was held off the record.)

(Whereupon, the following communication was had through a telephone communication.)

[37] Mr. Ruberry: Your Honor, this is Ed Ruberry in Chicago. We are here at the deposition of John Conboy.

Present in attendance, Your Honor, is Jack McConnell from my firm who has conducted the deposition, Kevin Flynn of the Coffield firm represents Mr. Conboy, and Jeffery Cross of Kirkland and Ellis represents Weyerhaeuser.

We are taking the deposition, and the witness has invoked the 5th Amendment, and Mr. McConnell wishes to make the following motion, Your Honor.

Mr. McConnell: Judge Singleton, Jack McConnell. I have asked the witness—First, let me give you a little background.

John Conboy is a former employee of Weyerhaeuser. He was employed by Weyerhaeuser from 1952 through 1980.

He is now employed by another company having nothing to do with this litigation. He is not a party, he is not an employee of a [38] party, and he is appearing here today pursuant to Subpoena which was served on him.

He previously gave an interview statement, and he also appeared before the Grand Jury. We have his entire interview statement, and we have his Grand Jury testimony.

I have asked the witness a series of questions which literally track the questions and answers which were put to him in his government interview statement. As to all questions and questions based on the answers given, he had invoked the 5th Amendment.

Further, his Counsel has stipulated, Mr. Flynn, that if I were to ask similar questions tracking the balance of the government interview statement, the witness would continue to invoke the 5th Amendment.

Until, I believe it was May 15th, we were under the impression that John Conboy, the witness, would testify substantively and not invoke the 5th Amendment.

On May 15th, we were advised by [39] letter that he would invoke the 5th Amendment, and we have since been advised that 12 other Weyerhaeuser witnesses are going to invoke the 5th Amendment.

The Court: As employees or former employees?

Mr. McConnell: Both. Some of the witnesses are current employees, and some of the witnesses are former employees; but they are all key people who, from their interview statement or Grand Jury transcripts in those instances where we have them, were key people heavily involved in price-fixing activities.

Now, the purpose of my call is to move, Your Honor, to compel the witness to testify to the series of questions tracking his government interview statement.

I should also add that I have indicated to the witness and to his Counsel that unless otherwise indicated, all of my questions relate to the period prior to January, 1975; so that it is clear that the 5-year Statute of [40] Limitations has run.

The Court: The Statute of Limitations, the Statute in Illinois?

Mr. McConnell: It's 5 years or less.

Mr. Flynn: Your Honor, if Mr. McConnell is through with his Motion to Compel, if I might respond.

Your Honor, this is Kevin Flynn, I am here on behalf of Mr. Conboy. Your Honor, some clarifications with regard to background facts concerning this witness.

During the period 1971 through 1974, Your Honor, Mr. Conboy was employed as the Central Region Marketing Coordinator for Weyerhaeuser Corporation. His plant or his office was located in Worthington, Illinois—I'm sorry, Worthington, Ohio.

As Your Honor knows, as he has been advised in the past with regards to such motions to compel, the State of Ohio has a virtually limitless Statute of Limitations concerning antitrust activity, violations of [41] the state's antitrust law.

The fact that the Statute of Limitations concerning a federal antitrust violation has arguably run, as stated by Mr. McConnell, is not of great significance to Mr. Conboy or to myself, Your Honor, as his Counsel, to the fact that the questions that Mr. McConnell has posed today refers to Mr. Conboy's activity in Worthington, Ohio, in a state in which there is no Statute of Limitations concerning such alleged antitrust violations.

Secondly, Your Honor, with regard to the fact that Mr. McConnell appears to be tracking—as he refers to it—tracking the Grand Jury interview transcript of Mr. Conboy, Your Honor, I respectfully submit that that has no significance to the issue at hand.

As Your Honor knows, and as I have previously argued before Your Honor, the fact that the Plaintiffs here are attempting to essentially violate the 5th Amendment Rights of [42] this witness by using prior immunized testimony has no impact whatsoever on the legitimacy of his 5th Amendment assertion or the sincerity of his concern with regard to self-incrimination. That matter has already been adjudicated in the 5th Circuit, Your Honor, concerning that very matter.

The Court: Adjudicated in the 7th?

Mr. Flynn: No, the 5th Circuit, Your Honor.

The Court: I thought it was the 5th and 2nd.

Mr. Ruberry: And the 8th, Your Honor.

The Court: But it has not been in the 7th?

Mr. Cross: Your Honor, Jeffery Cross representing Weyerhaeuser Company. I'd like to make a statement for the record.

So far, in the Opt-Out cases, the Plaintiffs have received full testimony without any assertion of the 5th Amendment from 7 Weyerhaeuser employees or former employees; [43] and recently they have been told that 2 additional Weyerhaeuser employees would be testifying, Mr. Yates and Mr. Cutler—In fact, Mr. Cutler's deposition was scheduled previously, but I unfortunately had to have emergency surgery for acute appendicitis, and that 1 has been postponed again pursuant to agreement of Counsel.

I have also informed Plaintiffs' Counsel that 6 additional employees, current employees, were listed on Opt-Out Plaintiffs' Deposition Notice, and number 7 would be available and would give full testimony.

Mr. Ruberry: I have written a letter to Mr. Cross. These are nothing but a sham. The 6 witnesses he has offered to give us—

The Court: It has nothing to do with Mr. Conboy, though?

Mr. Ruberry: No, Your Honor. We will drop that.

Mr. McConnell: Your Honor, Jack McConnell again. On Conboy, what I have attempted [44] to do here is to follow the Fleischacker opinion and to track the government's interview statement so that it is clear that any testimony that we get on this deposition is derived from his earlier immunized interview statement and is, therefore, protected.

Mr. Flynn: Your Honor, I am not quite sure what Mr. McConnell means when he says he is attempting to follow the Fleischacker opinion.

With regard to the issue of whether the 7th Circuit has considered this particular matter, Your Honor, again I am not exactly sure what significance the 7th Circuit has in this matter. You are the presiding Judge over this multi-district litigation, Your Honor; and the 5th Circuit, I think, would be the appropriate circuit to resolve this matter if a resolution is necessary.

The Court: The 5th Circuit doesn't think so.

Mr. Flynn: Your Honor, with regard [45] to the fact that the 7th Circuit may have not addressed this specific issue, I might cite, Your Honor, Judge Will's opinion in the Folding Carton litigation which is cited as 465 Federal Supplement—

The Court: Was it reversed, Judge Will's opinion?

Mr. Flynn: Yes, that is the decision in which they did reverse Judge Will on a Motion to Compel Deposition Testimony over a 5th Amendment assertion, but I would—

The Court: That was based upon Will's statement that there was no possibility of prosecution?

Mr. Ruberry: That's correct, Your Honor.

Mr. Flynn: That is correct, they reversed it on that basis.

The Court: The 7th Circuit didn't consider what was considered in both Fleischacker in the 2nd and Franey in the 5th?

Mr. McConnell: That's correct, Judge.

[46] Mr. Flynn: I might, though, cite the Court to an observation that Judge Will made in his Folding Carton Antitrust Litigation opinion that I just cited, Your Honor, contained in page 629 of that opinion in which Judge Will states as follows:

"Even assuming that we ordered a release of the prior immunized testimony and confined Plaintiffs to asking questions which were actually asked under the Grand Jury Immunity Grant, we could not prevent the deponents from testifying in greater length and detail about potentially incriminating transactions."

Your Honor, that is the cause for my concern and my recommendation to Mr. Conboy that he continue to assert the 5th Amendment. There is absolutely no way that we can assure Your Honor that if we respond affirmatively or respond in any other manner to the questions that have been asked by Mr. McConnell today, that we will not be placing Mr. Conboy in additional jeopardy concerning [47] self-incrimination or that we will not, in a future point in time, be charged with an inadvertent or tacit waiver of our 5th Amendment rights.

It's a problem that Judge Will—and Your Honor is aware of the fact that Judge Will has voiced some criticism with regard to the 5th Amendment assertion—he does concede the fact that there is a very difficult logistical problem with the idea of tracking Grand Jury testimony and the thought that that somehow preserves a prior grant of immunity.

Judge Will has conceded, in the very opinion in which he ordered that testimony be provided, that that is simply not a feasible approach.

The Court: Well, let me say this. First, let's get a legal technicality out of the way; that is, that I will say that I am empowered to sit as a District Judge in Illinois under 28 U.S.C. §1407, that I can sit as a District Judge in [48] Illinois, although physically being in the Southern District of Texas, okay?

Mr. McConnell: Yes, that's our view, Your Honor.

The Court: All right. That's the position I take, and I think that position was upheld.

Mr. Ruberry: The 5th Circuit indicated that on Monday, Your Honor.

The Court: Any way, Fleischacker upheld that position.

Mr. McConnell: Yes.

The Court: So let's get that out of the way. Secondly, let me speak to Mr. Conboy.

Examination by the Court.

Q. Mr. Conboy?

A. Yes, sir.

Q. Have you been sworn?

A. Yes, I have, sir.

Q. Are you the same Conboy that gave the government interview transcript relating to your [49] work in your corrugated industry for Weyerhaeuser prior to December 31, 1975?

A. I am.

Q. And did you testify before the Houston Grand Jury relating to that?

A. Yes, Your Honor, I did.

Q. And do you have before you or have you had an opportunity to have before you your transcript of your Grand Jury testimony and your interview with the Department of Justice?

A. They are here, sir.

Mr. Flynn: Your Honor, a point of clarification, both the interview transcript and the live testimony

transcript were tendered to Mr. Conboy during his deposition as a deposition exhibit.

Mr. Conboy stated, however, that he, since, shortly after giving that testimony, has not reviewed the testimony subsequent to that, and he has not reviewed the testimony today.

The Court: They are there for him?

[50] Mr. Flynn: That's correct, Your Honor.

The Court: Q. Mr. Conboy, you no longer work for Weyerhaeuser?

A. That's correct.

Q. Are you working in the corrugated industry?

A. No, Your Honor, I am a head-hunter. Do you know what that is?

Q. Yes, sir, I do.

A. Well, that's what I am.

Q. So your work is not related to the corrugated industry in the sense of having any active involvement in that industry?

A. No, sir, it is not.

Q. All right, sir. Now, where are you living now?

A. In Chicago.

Q. While you were with Weyerhaeuser and before December 31, 1975, you were with Weyerhaeuser where?

A. My office was in Worthington, Ohio; [51] but I retained residence in Chicago.

Q. But your work was in Worthington, Ohio?

A. From 1971 until about July of 1975.

Q. It was in Worthington?

A. Yes, sir.

Q. What was your capacity at Weyerhaeuser at that time?

A. I was Regional Marketing Manager.

Q. Now, has anyone from the Attorney General's Office in Ohio contacted you relating to your work?

A. No.

Q. Prior to December 31, 1975?

A. No, sir.

Q. Are you a party to any lawsuit involving that work?

A. I am not.

Q. Have you been called as a witness—other than in this case—in any case arising out of Ohio?

A. No, Your Honor, I haven't.

[52] Q. Related to the corrugated industry and your work in that industry?

A. No, sir.

Q. All right, sir. Now, what I am going to do, Mr. Conboy, is order you to answer the specific questions asked you in either your Grand Jury transcript or your government interview transcript, those questions; the lawyers must give those questions to you, okay?

A. Yes, sir.

The Court: Mr. McConnell and Mr. Ruberry, why don't you ask him some of those questions?

Mr. McConnell: I will do that. I am referring now to Page 65 of the interview statement, Your Honor; and the witness has a copy, and he can follow along with me.

Direct Examination Resumed by Mr. McConnell.

Q. "Question: Who did you have price communications with at Alton Box Board?"

[53] A. Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

The Court: All right, sir. Mr. Conboy, I will order you to answer that specific question, and you may

answer it just as you answered it in the interview transcript.

Mr. Cross: Your Honor, for the record, Jeffery Cross from Weyerhaeuser. I would object to the form of the question as ambiguous and not stating a time period.

The Court: I will overrule that objection. Now, Mr. Conboy, you are to answer the question just as you answered it in the interview transcript.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege [54] against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

The Court: All right, sir. Now, would your position be the same as to every other question asked you from that interview transcript or in the Grand Jury testimony?

The Witness: Yes, sir, it would.

The Court: All right, sir. I will hold you in contempt for failing to answer the specific questions just asked you and fine you $5,000 and impose a 6-month imprisonment until you do answer or purge yourself in that contempt.

I will stay execution of that judgment for a sufficient length of time to permit you to answer, if you are going to take appeal to this ruling for the 7th Circuit.

Mr. McConnell: All right, Your Honor; I think that takes care of the matter.

The Court: The stay ought to be for some specific period of time. It makes no [55] difference to me how long that is, just as long as it is some reasonable period of time in which the appeal can be protected and carried through to its conclusion.

Mr. McConnell: I would suggest 5 days, Your Honor.

The Court: That's fine with me.

Mr. Flynn: Your Honor—

The Court: Mr. Conboy's attorney, Mr. Flynn?

Mr. Flynn: Yes, Mr. Flynn speaking. If I could, just a matter of clarification. Are you holding Mr. Conboy in contempt of court pursuant to 28 U.S.C. 1826, the Recalcitrant Witness Statute?

The Court: I believe that's the statute.

Mr. Ruberry: That's correct, Your Honor, that's the statute.

The Court: I will take it from you lawyers the applicable statute involved.

Mr. McConnell: That's it, Your Honor.

[56] The Court: I think it is, but I don't want to be led into some trap until I look it up.

Mr. Flynn: No, Your Honor; I was only inquiring as to whether I would have to follow the Expedited Appeals Provisions of that statute.

I would ask, Your Honor, that we be given a little bit more time than 5 days in which to perfect the appeal.

The Court: It's all right with me. I'm not going to put any hardship upon you or Mr. Conboy.

Mr. Flynn: I appreciate that, Your Honor.

The Court: If you tell me that 5 days is too short and you want some other period of time, that's fine, if you get it on the record.

Mr. Flynn: Your Honor, if we could have 10 days, I'm sure that would be adequate for us to make a well-reasoned determination as to whether we do want to seek review of [57] Your Honor's order.

The Court: All right, 10 days. I will stay execution of the order for 10 days with the understanding that within that period of time, an appeal will be taken and perfected to a conclusion, or Mr. Conboy will change his mind.

Mr. McConnell: All right, Your Honor. I think that takes care of it. Thank you very much.

Mr. Ruberry: Thank you, Your Honor.

Mr. Flynn: Thank you, Your Honor.

The Court: All right, thank you.

(Conclusion of telephonic proceedings.)

Mr. McConnell: Q. Mr. Conboy, we have just had a telephonic conference with Judge Singleton, during which he first ordered you to answer the question, "Who did you have price communications with at Alton Box Board?" And to which you continued to assert the 5th Amendment.

[58] At that time, Judge Singleton held you in contempt and fined you $5,000 and sentenced you to 6 months imprisonment but stayed execution pending perfection of appeal under the Recalcitrant Witness Statute.

The Court also said that if you changed your mind and decided to purge yourself of contempt by answering the question, that that would purge the contempt and you would no longer be subject to those sanctions.

So I will ask you again at this time to answer the question, "Who did you have price communications with at Alton Box Board?"

Mr. Flynn: Well, with regard to that, Mr. McConnell, we have stated our position to the Judge that it would take us some time to determine whether we want to seek a review of the Judge's order or want to avail ourselves to the opportunity afforded to purge ourselves of the contempt; so I think it is unnecessary and simply an effort to badger the witness.

You cannot make your record at the [59] expense of this witness and ask your same questions after he's been held in contempt of court for refusal now to respond to that question twice or possibly 3 times.

The Witness: Pursuant to my attorney's advice, I respectfully decline to answer that question based upon the privilege against self-incrimination accorded to me by the 5th Amendment to the United States Constitution and my rights under the 14th Amendment to the United States Constitution.

(Witness Excused.)

[60] (Certification of Shorthand Reporter and Notary Public omitted in printing.)

Conboy XI ID—5/20/81

Interview of John A. Conboy, National Accounts Salesman, Weyerhaeuser Company, Chicago, Illinois, January 10, 1978, in the offices of the Department of Justice, Antitrust Division.

In The Matter Of: Sworn Testimony Of Mr. John A. Conboy

Appearances:

Mr. Russell Abrego
Ms. Constance M. Garrett
Attorneys at Law
Antitrust Division
United States Department of Justice
Suite 8C6, 1100 Commerce Street
Dallas, Texas, 75242

Coffield, Ungaretti, Harris & Slavin
100 West Monroe Street
Chicago, Illinois 60603
By: Mr. Michael W. Coffield and
Mr. Ed Novak

Be It Remembered, that on the 10th day of January, 1978, an interrogation of Mr. John A. Conboy was held at the United States Department of Justice, Antitrust Division, 1100 Commerce Street, in the City of Dallas, County of Dallas, State of Texas, and the following proceedings were had, [2] to-wit:

JOHN A. CONBOY, the witness hereinbefore named, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Examination by Mr. Abrego.

Q. Would you please state your full name for the record?

A. My name is John Conboy, John A. Conboy.

Q. And what does the "A" stand for?

A. Anthony.

Q. And what is your address, Mr. Conboy?

A. 535 North Michigan Avenue, No. 1514, Chicago, Illinois, 60611.

Q. And who are you currently employed with?

A. I'm employed by Weyerhaeuser Company.

Q. In what capacity?

A. National accounts salesman.

Q. How long have you had this position?

A. Since July, 1975.

Q. Prior to that time, what was your position?

A. For the period about April, 1971, until July, 1975, I was the marketing coordinator for the central region of the shipping containers of Weyerhaeuser Company.

[3] Q. For what region, then?

A. Central region.

Q. As national account salesman, who do you report to?

A. Richard L. Dixon.

Q. And what is Mr. Dixon's position?

A. National account sales manager.

Q. For what region?

A. It isn't really defined by a region. He has the central part of the United States.

Q. Who does Mr. Dixon report to?

A. Winfield Scott Wilson.

Q. And what is Mr. Wilson's position?

A. He is marketing manager of the shipping container division of Weyerhaeuser Company.

Q. How long has Mr. Dixon been in this position?

A. He came to Chicago in September of 1975.

Q. Prior to that time, do you know what he was doing?

A. He was the sales manager at the Modesto, California plant.

Q. How long has Mr. Wilson been marketing manager of the shipping container division?

A. About four years.

Q. 1973?

[4] A. At the end of '73, or early '74, yes.

Q. Who does Mr. Wilson report to?

A. Jack Wecter. I'm sorry, now I think he reports to John Savage.

Q. And how long has this been?

A. It's only for about a year.

Q. Before Savage he reported to whom?

A. Directly to Jack Wecter.

Q. And what is Mr. Wecter's position?

A. He is vice-president of the container board division of Weyerhaeuser Company.

Q. How long did Mr. Wilson report to Mr. Wecter?

A. He reported to him in two capacities. At one time he was the general manager of a shipping container division, and that was from a period of about—oh, early '71, or sometime in '71, anyhow, through the '74 date, and then as marketing manager. They abolished the position that he had at that time, he became the marketing manager for the two years, until John Savage took over, so approximately, I would say, he reported to Jack Wecter for about five years.

Q. Okay, as marketing coordinator, who did you report to?

A. Robert McNaughton.

Q. And his position?

[5] A. He was central region manager.

Q. And who did McNaughton report to?

A. For the period '71 through '74, to Win Wilson, and subsequent to that, directly to Jack Wecter.

Q. When did Mr. McNaughton die?

A. July 2nd, 1975, or something like that.

Q. So from '74 to '75 he reported to Wecter?

A. Yes.

Q. Okay, as marketing coordinator, what exactly were your responsibilities?

A. To oversee the general sales activities of plants located in Mount Vernon, Ohio, Detroit, Michigan, Three Rivers, Michigan, Rockford, Illinois, and until about the middle of '74, Columbus, Indiana.

Q. What exactly do you mean by "to oversee the sales of the plants"?

A. Well, perhaps "coordinate" would be a better word. Each plant has a sales manager who reports to a general manager. He did not report directly to me. His function to me would be a broken-line relationship, and they submitted their budgets and their goals and standards of performance to their general manager, and also to me, and I tracked them through the year, and it was my job to communicate to them the thoughts of the regional management on what our goals should be. I also [6] accompanied the sales manager on calls, and appeared at sales meetings that they would have.

Q. Did you have any involvement in the determining of prices?

A. On certain accounts, yes. On accounts that were local by nature, no. Accounts that were national, where the selling responsibilities rested other than in the plant that was going to run it, it was filtered through me, yes.

Q. Okay, what exactly did you do on these national accounts?

A. Well, many of the national accounts, I put out inquiries periodically, either annually or semi-annually. Those would be submitted to my office. I would send them out to the various plants that would be quoting on

the business. Then when the replies would come back, why, I would be the one that would submit them to the company that had the inquiry out, and there would be, of course, before the replies came back, we would have conversations about what I felt their level should be in order to get a piece of business.

Q. What was the function of your national account sales organization in your role here? It seems like you were shortcutting it there.

A. I don't understand what you mean by [7] "short-cutting."

Q. Okay, when you were marketing coordinator, were you also part of the national account sales organization?

A. Starting at about 1974, yes, I divided my time between national accounts and regional business.

Q. Okay, during this time, then, as I understand it, your plant sent the prices for the national accounts, for them to submit prices to the customers.

A. Yes. In almost every instance the plants will set their prices. They are a profit center, and they are responsible for their prices, so they also will set the prices. We guide, and sometimes lead them into the pricing from information that we glean from contacts with the customers. The numbers are submitted to them for their study, and if they like them, why, fine, they will go with what we suggest.

Q. Then do I understand it correctly that you were a support, like a support staff to the local plants in terms of getting pricing information to them?

A. Yes, sir.

Q. And they in turn would send it up to the national accounts people to present to the company?

A. Well, I was sort of performing a dual role there. I was the national accounts fellow that they [8] would usually send them to.

Q. Did you do these on all national accounts, or just some?

A. No, just some. There are many national accounts, what we consider national accounts in the country, and I would say that there may have been twenty-five that we had a direct relationship to.

Q. Can you name some of these?

A. Yes, Anchor-Hocking Glass Company, Borden Company. I'm trying to go alphabetically. I'm not doing so good, Libby, McNeil, and Libby, Stokely, Van-Camp, Quaker Oats, Swift & Company, now S Mark. Those are the principal ones. Proctor & Gamble, I'm sorry, I passed up our biggest account. Proctor & Gamble not our biggest account. Fairmount Foods is another one.

Q. Which was that, again?

A. Fairmount Foods, I'm sorry.

Q. Now, where did you get this information from?

A. Well, we have national account salesmen, and also I got it from calling on the accounts personally.

Q. Did you handle all these accounts yourself?

A. I have had a hand in handling all those myself. I'm not directly responsible for them myself, but I coordinated the activities at that time of all of those.

Q. Did you ever get any information from [9] competitors?

A. Yes.

Q. Did you ever get any information from superiors that was obtained from competitors?

A. Yes.

Q. And this is the type of information that you would pass on to your local plants to set the prices?

A. That's a blanket statement. Let me think about that for a moment. I would pass it on to the plants, and that made them aware of what the competition was going to set a level at, but it did not necessarily force them to set their prices at the same level.

Q. Well, if it didn't make them set it at the same level, would it be what is known in your industry as being set competitively, based on this information?

A. Well, not necessarily. What I was referring to when I said that was that perhaps the account information I might have reveived said someone is going to raise their price X percent, and we did not feel it was going to go that high, we would not do it, or the price that would be submitted might be too low to satisfy the needs of our particular operations, and they wouldn't go at that price.

Q. Who resolved the situation where your plants—you said they were independent profit centers, and they [10] could set their own price?

A. Right.

Q. Who resolved the problem, then, if the price came in as a price that was one not recommended, who would handle that?

A. It would probably go back to the regional manager.

Q. And that would have been who?

A. Well, it depends on the region where the plant is located.

Q. Okay, say, in your region?

A. It would have been Bob McNaughton.

Q. And he would have solved the problem?

A. Yes.

Q. What would be your input into the decision by Mr. McNaughton?

A. Well, I would give him the facts as I saw them, and then it would be up to him to make the decision as to whether we should go with the level that would be competitive, or whether we would stick with our own pricing.

Q. How often would that happen that you would have to take a pricing situation like this to McNaughton to resolve?

A. Not too frequently.

[11] Q. So then most of the instances where you would guide your plant, they would except (*sic*) your information and price accordingly?

A. Yes.

Q. With regard to the local plants and your communications with competitors, did you talk with competitors about percentages of increase?

A. From a period about 1972, on until all communications ceased, why, it was that percent of where we were going, rather than speaking about specific numbers.

Q. And this was from '72 to when?

A. Oh, the latter part of 1974.

Q. And there was none after '74?

A. No, sir, there was none after '75, the beginning of '75. Now, the end of '74, I can't tie that in from my recollection directly. There was little, if any, but from early '75, I know there was none.

Q. Okay, so during this period of time where you were talking with your competitors with regard to percentage of increase, you would pass this information on to your local plants?

A. Right.

Q. And they would follow it?

[12] A. In most instances, yes.

Q. And when I'm talking about percentage of increase, I'm meaning that you agreed to a percentage of increase. Do you understand that?

A. Yes.

Q. Okay.

A. I'm saying that at a specific account we would make a statement and say we are going to six percent, and that was it. Now, if competition, when the word got out to them, if they chose to follow that was up to them, but when I got the word back in the same manner, why, that was a decision that was made locally, but, yes, it was an agreed upon percentage in most instances that we would follow.

Q. Okay, did you ask your local plants to get competitive information from competitors?

A. On occasions, yes.

Q. And what would you do with this information?

A. Use it to set the price that I would submit or that the company, at least, would submit on a quote.

Q. Based on your conversations with competitors, did you ever veto one of your local plant's prices?

A. I don't recall.

Q. Would that be resolved by going to Mr. McNaughton?

[13] A. Yes, I suppose it would, if it occurred.

Q. Have any of your superiors vetoed any of your prices based on information gained from competitors?

A. Not that I recall.

Q. Before you quoted, would you discuss with your superiors information that you had received from competitors as to, say, percentages of increase?

A. Yes, Mr. McNaughton.

Q. He knew where you got this information from?

A. In most instances, the information came the other way, from McNaughton down to me.

Q. In those instances where you got the information, would you tell him?

A. Yes.

Q. Did you ask McNaughton where he had gotten the information from, or did he tell you?

A. He would always tell.

Q. He would tell you, "I got the information from X company, or X individual"?

A. He would keep saying, you know, "ABC is going six percent, or eight percent, so move accordingly."

Q. Other than telling you that ABC Company is moving eight percent, did he tell you that he had talked to a certain individual at that company?

A. Frequently.

Q. After Mr. McNaughton, did you discuss prices with your superiors? I believe that would have been Mr. Savage?

A. No, Mr. Savage was never my superior. After McNaughton died, I went directly under Win Wilson. John Savage is the one we spoke of before. There is another Savage involved.

Q. After McNaughton, did you discuss this information, this type of information with Mr. Win Wilson?

A. No, sir, I did not.

Q. Would you please clear that up? I didn't get that straight.

A. Well, McNaughton died in July of 1975. During the period from the middle of '74, when I was sort of sharing my time with national accounts half time, and regional business half time, I was reporting to both Win Wilson and Mr. McNaughton. I am able to pinpoint the time of early 1975 because I never went back to Worthington after December of '74. My wife had a very serious operation, and I stayed in Chicago, and during my stay in Chicago, while I was still at a desk or an open space, it had to be like January I got a call from Win Wilson, and he told me that as of that date, any communications with any competitors on any kind of [15] pricing information would result in immediate discharge, so that was enough for me to cease and desist.

Q. Prior to this time had you told Mr. Wilson where you had gotten competitive information?

A. I imagine I might have, if there was any instances where I got competitive information on accounts that Win had an interest in. I don't recall ever telling him anything, though. I can't think of a specific instance.

Q. Was Mr. Wilson generally aware that you were communicating?

A. Up to the middle of 1974, he was aware the communications were coming out of the Worthington office.

Q. Where is Worthington located?

A. Ohio, right outside of Columbus.

Q. How was Mr. Wilson aware of that?

A. Well, through conversations with McNaughton or myself.

Q. You would tell him, then, that you had spoken with a competitor and had gotten information, or had given information?

A. Yes.

Q. Now, on these percentages of increase that you would talk with your competitors on, did you have the authority to say, "Yes, we'll go with that," or [16] would you have to discuss that with some of your superiors?

A. I would have to discuss it with my immediate superior, or the general manager of the plant that was going to run the business.

Q. On these national accounts type business?

A. Yes.

Q. Wouldn't McNaughton have the authority to agree to that percentage of increase that you got from a competitor, or would he have to discuss it with someone higher?

A. No, McNaughton had the authority to agree and advise his plants that this was the number that was acceptable to him.

Q. A lot of these companies are nationwide and have plants that buy in various regions, therefore it would affect your entire organization, and how was this approved so that it could be, you know, throughout your organization?

A. Well, most of the business with which we dealt in the midwest was business that was situated in the midwest, and any agreement would probably have come from McNaughton and/or Bob Savage.

Q. Now, Bob Savage, who is he, and what does he do?

[17] A. Robert Savage was the regional manager of the midwest region, now retired.

Q. Okay, who is McNaughton?

A. He was regional manager of the central region.

Q. I always get confused. Central is always midwest to me.

A. Yeah. Well, at one time it was one region, and then they broke it up in 1971 and made two managers.

Q. Okay, so then any agreement as to percentage of increase that you had gotten from a competitor, you say had to be approved by Bob Savage and McNaughton?

A. If their plants were involved, yes.

Q. And did Savage agree with McNaughton on this type of business often?

A. There was seldom disagreement.

Q. If there was a disagreement—do you recall there being a disagreement?

A. No, I don't.

Q. Who would have to then resolve that disagreement between McNaughton and Savage?

A. Well, I don't know that anyone, you know, thumped the table and said, "This is the way it shall be." I don't recall that there was any occasion where anyone else had to be brought into the picture.

Q. I would like for you to walk me through one [18] of these communications that you had with a competitor. Let's say a gentleman calls you and tells you that "We are going up six percent."

A. Right.

Q. Do you agree with him that, yes, you will too, or do you say, "We'll have to call you back on this," or how does it work?

A. Well, first of all, if we are a participant in the account, we certainly knew what we wanted out of the account also. We had a plan as did competition have a plan of action. If they called and said they were going up six percent, and we had previously decided to go eight percent, we'll say, "No, we are going eight percent." If we decided to go four, we would say, "We are only going four percent," and that would be it. That was the end of the conversation. Then we would, of course, have another discussion and say, "ABC Box Company is going six and we are going eight."

Q. You and McNaughton?

A. McNaughton, yes. "What should we do?" Then there is a contact made with the local people as to what their relationship is with the account, and can we hold the business for two percent more, if we were very competitive from the coming out of the gate, you [19] know, the starting point. We usually—and national accounts, you will find that you put in a number, and your competition puts in a number, and unless something is going to precipitate a big change in the account, the people in the account will say to you, "You are three percent high," or, "You are four percent high," and you will be led back to the number. We don't always know that they are telling us the truth. We presume that they are. So you wind up in national accounts where you are sharing that almost everybody has the same number, within a

few cents of each other, not because the people who are supplying it come up with those numbers, but because you are led in by the purchasing department of the account, so usually we knew that we were starting from a common base, if we were sharing an account previously, so it was a case then of deciding whether we could get away with percentage greater than competition had decided to go, or perhaps after we told them that we were going eight percent, maybe they would try eight percent.

Q. Would you call the competition back and inform them that based on—

A. No, I told them.

Q. You told them?

A. I told them when the original conversation [20] would take place. There was no indecision.

Q. In instances where the competition wanted to go less than you, did you have the authority to go to that lesser amount?

A. Well, I didn't have the authority to go anywhere. I would have to submit the numbers to the plant that was going to run it, and, once again, we would come back to the question of would they accept. If not, then the question would have to be resolved by McNaughton.

Q. And would he then contact competitors to advise them of what your position was in trying to get them to up their percentage of increase?

A. He did that frequently, yes.

Q. Did Savage do the same thing?

A. I don't know.

Mr. Coffield: Do you mean Bob Savage?

A. Yeah, Bob Savage.

Q. (By Mr. Abrego) Would McNaughton have to go to his superior, I guess Mr. Wilson?

A. No.

Q. And discuss that with him?

A. No.

Q. Have local plants refused to take business that you have recommended, or prices of business, based [21] on pricing that you recommended?

A. Yes. Now, the question is sort of misleading. When I say they have refused to take it, they have refused to submit prices at levels that I have recommended. Whether they would have gotten the business or not is another question. Do you follow me?

Q. No, explain that a little bit.

A. Well, the fact that I submit a price, I can be, you know, ten percent low, and that doesn't guarantee that I will get the business. And if I submitted a price to the local plant, they may turn the price down, but they have not had an opportunity to turn the business down yet, because it wasn't awarded to them. They are refusing the price. They are not refusing the business, because they have not been exposed to the business.

Q. Well, that's really just a semantical game there. If they refuse the price, it pretty well follows that they will refuse the business?

A. Yeah, but you asked if they had refused the business.

Q. Okay, when they refuse a price, does that mean that they will refuse the business?

A. Well, it means that they are not going to quote. [22] Q. To quote?

A. At that level.

Q. Some of your national accounts in your area may have their big headquarters in New York. How do you coordinate, say, for example, on an agreed percentage of increase, with Will Gates in New York, say, he sets the price there?

A. Well, in that case, in most instances I have nothing to do with the business. It's a case of Will Gates sending out the inquiries the same as I send them out of the central region, where I used to send them out of the central region, Will would send them out to the local plant.

Q. Even within your region?

A. Within our region, and they would reply to Will Gates, not to me.

Q. Would you have any input to the local plants as to the prices?

A. Not really, no because I wouldn't have that much interest in the piece of business.

Q. That would be strictly his ball game?

A. Right.

Q. Was there ever a time where you, and, say, one of the other national accounts coordinators, or sales managers, would not agree on percentage of increase [23] for that portion of the business that was within your responsibility?

Mr. Coffield: Could I have that question back, please?

(Thereupon, the last question was read by the reporter.)

A. Well, the business would not be within my responsibility. I go back once again to the previous question where I did not enter into Will Gates' business, or Bob Scouton on the west coast, and things like that. They got their prices from the plant to which they submitted the inquiry. If there was a problem, the problem was brought back to McNaughton, once again, the same as we have gone over in our own region, and it would be resolved between McNaughton and Gates, in that instance.

Q. (By Mr. Abrego) Did Mr. Dixon have any input into price decisions for accounts that you handled, or were responsible for?

A. Well, yes. Frankly, we all have input into the decision-making right now, today, as to what we are going to do on a given account, and what strategies should be employed to keep the business or increase it.

Q. Do you know whether he had communications with competitors?

[24] A. I don't know that he had any communications with competitors. I'm inclined to think that since my relationship with Dixon started in September of 1975, that he had none.

(Off-the-record discussion.)

Q. (By Mr. Abrego) Let's go back on the record. You said your communications with competitors ceased in mid '75?

A. No, in the latter part of 1974.

Q. And there was none in '75?

A. No, sir. If I may, if communications with competitors means exchange of information, my answer stands for the record. If it means was I contacted for information, yes, I was contacted for information, and told people that I was not on the telephone.

Q. Was Mr. Wecter aware that you were communicating price information with competitors?

A. I don't know. I can't answer that.

Q. Do you have any reason to believe that either he knew of your communications or was himself engaged in communications?

A. No, sir, I do not.

(Thereupon a recess was taken.)

A. May I have the question, again?

Mr. Abrego: Back on the record, why [25] don't you go ahead, Mrs. Court Reporter, and read back the last question about Mr. Wecter.

(Thereupon the last question was read by the reporter.)

(Off-the-record discussion.)

A. Okay, the first part of my answer, I think still holds, that Jack Wecter, I never told Jack Wecter that I was in communication with anyone, and he never communicated directly to me any communications that he might have had with anyone, or any knowledge that I had communicated. Okay, Quaker Oats inquires their business for a period of July 1st through June 30th of each year, that being the fiscal year. In 1974 I was told by Bob Haynes of PCA that he had informed Jack Wecter and Win Wilson at a meeting in New York in the fall of '73 that it was his plan to increase Quaker Oats fifteen percent. He indicated to me that he had received agreement from Mr. Wecter and Mr. Wilson that Weyerhaeuser would be doing the same thing. I'm hesitating, catching up with your writing. When it came time to submit the prices in April of '74 for the next period, I did not increase the prices fifteen percent, I increased them eight percent. Mr. Haynes approached me and was very angry that I did not follow the fifteen percent that he stated had previously been agreed to, and said he was [26] going to do something about it.

Q. Okay.

A. He contacted either Mr. Wecter or Mr. Wilson and said that I had not lived up to the commitment. Okay, Win Wilson contacted McNaughton. I was not available, for some reason, or if I was, he didn't contact me directly to find out why this had previously been discussed, the strategy of not going the fifteen percent had been discussed with McNaughton by me, and he agreed with my feelings, communicated them to Win Wilson, and insofar as what happened subsequent to that, I don't know.

Q. How do you know Mr. Haynes talked with either Wecter or Wilson?

A. He told me he did. That was sort of—he told me he did.

Q. Did he tell you who exactly he talked to?

A. Yes, he did, Wecter and Wilson.

Q. He said he talked to both of them?

A. Yes.

Q. Not and/or, but both?

A. Both. He talked to Wecter and Wilson.

Q. What finally happened? Were you instructed to raise your prices, or leave them alone?

A. No, sir, the prices stood as I submitted them.

[27] Q. Are you aware of any more communications between Mr. Haynes and Mr. Wilson or Mr. Wecter?

A. No, as far as I know, that ended it, because it never came back to me again.

Q. Did you subsequently raise your prices to this account the next time it came around?

A. No, that was the quote for 1974, the period ending June 30, 1975. I don't recall what we did in 1975.

Q. Do you recall whether there was ever any communications between you and Mr. Haynes on this account in '75?

A. For the next period?

Q. Yes.

A. No, there was not. At this point Mr. Haynes didn't feel that I was trustworthy.

Q. Did you tell Mr. McNaughton that Mr. Haynes had told you that there was an agreement to the fifteen percent?

A. Yes, I did.

Q. Did you ask him to check it out with Mr. Wilson or Mr. Wecter?

A. No, I did not.

Q. Do you know whether he did?

A. No, I do not.

[28] Q. What was Wilson's reply to McNaughton's reason for not going to fifteen percent? Do you know?

A. Well, I wasn't in on the conversation, but I believe that Wilson agreed that what we did was correct.

Q. Do you know whether McNaughton told Wilson about the agreement that was brought up by Haynes?

A. No, I do not.

Q. Did McNaughton tell you—

A. I'm sorry, go ahead.

Q. Go ahead yourself.

A. I just have to assume, because of the circumstances, that there was an awareness on both parts, that there was conversation about the agreement. If there hadn't been, there wouldn't have been any problem

Q. All right, that's what I wanted to know, what Wilson said. Do you know whether Wilson said, "Well, forget that, we didn't mean it?"

A. Back to Bob Haynes?

Q. Yes, sir.

A. I don't know.

Q. What position does Mr. Haynes have?

A. He was vice-president of sales for Packaging Corporation of America.

[29] Q. Did you attend FBA meetings?

A. Yes, I did.

Q. Were you a regular attendee?

A. Yes, I was.

Q. What meetings did you go to, zone, regional or national?

A. I never went to a national meeting. I attended regional meetings, and occasional zone meetings.

Q. While at these meetings—and I mean before or after the actual meetings—did you have occasion to communicate price information with competitors?

A. Yes.

Q. When is the last meeting that you attended?

A. I haven't been to a meeting in about a year and a half, to the best of my knowledge.

Q. Okay, that's good enough.

(Off-the-record discussion.)

Mr. Coffield: Let me just make a statement for the record. As counsel for Mr. John Conboy, we are in receipt of a letter dated January 10, 1978, signed by J. Albert Kroemer, and acknowledged by John Conboy, which in part refers to the fact that documents personal to Mr. Conboy have been turned over to the Antitrust Division, and [30] were receipted for on December 27, 1977, an ' that those documents are now before Mr. Conboy, and he will refer to them. The letter itself of January 10, 1978, we would like to request be made a part of this transcript, and it speaks for itself.

Q. (By Mr. Abrego) Okay, Mr. Conboy, you have now the original of the documents that you submitted to your attorney?

A. Yes.

Q. We want to go through each of these pages, and we would like for you to point out to us what these notes mean, primarily if there were price communications involved. In doing so, you can refer to them. They have a page number on the first page, and we'll say a number C001, and please refer to that number when you are talking about these pages, so that we can have a reference point. Also, we would like for you to give us the date that you have on the page. Okay, starting off with Page 001, July 9, 1975, what do your notes on that page reveal?

A. Can we go off the record a minute.

(Off-the-record discussion.)

A. C001, all people on this page are Weyerhaeuser people, with the exception of No. 4, Gary Huddleston, [31] and he is a buyer, and was asking me for a price difference on a tape, or a glued carton.

Q. Was this to a competitor that you were sharing?

A. No, this is an account that we wanted to get. We were not then, nor are we now a supplier of the account, and we had submitted prices for a taped carton, and he wanted to know what the difference would be for a glued carton.

Q. And did you give him that information?

A. Yes.

Q. Would that not help him in determining a price to that account?

A. He is the account. He is the buyer for the account.

Q. Okay, how about C002?

A. There is nothing on there. Just on the top it says, "Wilson, Comparative Prices and Cost Sheets." Those are the cost sheets I got from Vaughn Schuts from a previous payment on Wilson items.

Q. Who is Vaughn Schuts?

A. He was the cost clerk at our Three Rivers plant.

Q. And these were the Weyerhaeuser prices?

A. Yes, they were the cost sheets so we could [32] develop Weyerhaeuser's prices.

Q. How about 003?

A. Okay, Item No. 4, dated July 14, Page C003, Belle is Belle Hanson who was secretary to Win Wilson at the time. This is long and involved. I don't know whether you—on this one, this is a Quaker item also. We had submitted prices for Quaker for the period beginning 1975 through 1976, starting July 1, 1975, when the business was awarded. Downing Box lost their business at the Rockford Quaker plant. Downing accused Weyerhaeuser of cutting the price.

Q. Okay.

A. Win Wilson called me and asked what the circumstances were, and these three items that I'm talking about here, Weyerhaeuser versus Downing, is a comparison of what the Downing prices are, and what the Weyerhaeuser prices are for the period. There was an assumption, of course, that the Downing prices starting the period were the same as Weyerhaeuser, because that's the way Quaker would work. They would not, as I stated before, pay any more to one supplier than another, so we were both starting from the same point. Since we were awarded a large piece of business, and Downing lost theirs, Downing felt that we had cut the price. Win Wilson asked me if we had, and I gave [33] Belle some numbers showing that we had not cut the price. We had figured them differently, but we had not cut them.

Q. (By Ms. Garrett) Mr. Conboy, from that note, can we assume that someone from Downing and/or another competitor called Mr. Wilson?

A. Karl Kiser of Downing called Mr. Wilson and stated that we had cut the price.

Q. At the top of that page indicates the date of July 14, 1975. Can we assume it was in 1975, communication with Mr. Wilson?

A. You can, yes.

Q. (By Mr. Abrego) Did Mr. Kiser call you also?

A. No, sir.

Q. Do you know if Wilson passed this information on to Mr. Kiser?

A. He passed it on to a representative of Downing.

Q. Do you know who?

A. No, I don't.

Q. How do you know that?

A. Because he subsequently called and said that they were not satisfied with my explanation.

Q. Did anything happen as a result of this last phone call?

[34] A. Did I change my price?

Q. Yes, sir.

A. No, sir, I did not.

Q. Did you pull it?

A. No. May we go off the record for a moment, and I'll explain what this is all about.

Mr. Coffield: Explain it on the record.

A. Okay, when submitting the Quaker prices, Quaker is based on a formula, X number of dollars per thousand square feet. In other words, if a box is eight feet, and the price for a hundred and seventy-five pounds is $20.00, the box would be $160.00 per thousand. Quaker also has an incentive. They had been having, they felt, a problem for many years that they were paying for warehousing that was not necessary. In other words, warehousing in our plant because their plant did not order quantities that were economical for us to produce. We put into the contract an incentive clause that if they ordered over a minimum quantity, we would reduce the price by a given figure at Rockford. It so happened that it was $.50 a thousand square feet. When Quaker sent out their bid, they sent out the formula sheet on which you fill in the numbers, and they also send you a big matrix with all of their boxes on it, and you then extend the price on the total buy, you [35] see, so what I did when I extended my price, Quaker on this matrix, they show the average release quantity per item. Now, on releases that were greater than the minimum quantity, I deducted the $.50 and extended my prices thusly. Therefore, our friends at Downing had just taken their formula and extended the prices based on the formula, which in reality was the price, but it was not in reality what Quaker was wanting to pay, so when my

total buy went before Quaker, and Downing's total buy went before Quaker, mine, naturally, was less. It was not a price cut. I don't know what Downing numbers were, but on the basic sheet on the formula sheet, I imagine they were extremely close. Weyerhaeuser and Downing, but the $.50 that I was taking off as that incentive clause made my prices better.

Q. Do you know whether Downing also had an incentive clause?

A. I don't know. It's the standard format of the Quaker formula. It's on there, a spot to be filled in, and I'm inclined to think that everybody who has business with Quaker has an incentive clause.

Q. (By Ms. Garrett) Sir, with respect to this incident, when did you make that note in your note pad?

A. On July 14, 1975.

Q. With respect to the incidents that were occurring [36] on the same day, before, or after? Did all this happen on July 14th of '75?

A. No, the prices were submitted, probably in April of 1975. Quaker makes an award of their business in late June of '75, so no one would know what anyone's prices were until the business was awarded, and you suddenly found yourself in or out, so Downing would not have been aware of our prices until they were informed that they were no longer going to participate in the Rockford Quaker business.

Q. What prompted you to make a note on this on the 14th of July?

A. A telephone call.

Q. From Mr. Belle?

A. No, from Belle Hanson. I'm sorry, I don't know whether Belle called me or I called her, but it was a telephone call, a conversation between Belle and me that I gave this information to her to be passed on to Win Wilson.

Q. (By Mr. Abrego) Okay, on the same page, C003, Item No. 1, R. Savage, would you explain that about Albert Lea.

A. Albert Lea is a location in Minnesota, and I do not know what account we are talking about, but whatever was up there, Savage says it may be a loser, [37] but he'll accept the business. In other words, it was not going to be a profitable item, or a profitable location, and I honestly don't know what it is, because the only one I can think of up there is Wilson, and Wilson is a profitable piece of business at Albert Lea.

Q. What are the dots at the end of the sentence?

A. After "Schlitz"?

Q. Yes, sir.

A. What do you call them?

Q. Doodles?

A. Doodles, yeah, and no significance to anything.

Q. How about Item No. 2?

A. Okay, Ted Kamish was the sales manager at our Barrington plant, and True Value is a large hardware chain. I don't know whether it's down here or not, but it's up in the northwest, in the northern part of the country, and they sell a lot of paint, and they own that business themselves, make it for themselves. Ben D. Mays is the—he was the buyer at True Value. They were building a plant in Allen Town, and Ted Kamish asked me to pursue the business for him, to see if we could become a supplier at Allen Town. It turned out later it was all in pails and no corrugated boxes, so there was no business.

[38] Q. What is this George, Keebler asking for lower price, what does that mean?

A. Keebler Biscuit. George is referring to George Rayfield, the national account salesman who covers Keebler. Kamish was supplying Keebler in Philadelphia,

and I think they are, and evidently this is the message that I was getting to George. The account was sold in Elmhurst, Illinois, but the people in Philadelphia had passed the word on to Kamish's salesman that they were looking for a lower price. They evidently had a competitive price that was lower.

Q. Did you pursue this matter?

A. I probably told George about it, George Rayfield, and what happened after that, I don't know. It was not my responsibility at all.

Q. (By Ms. Garrett) Are there any other references to price communications on this page?

A. No, there are not.

(Off-the-record discussion.)

A. Oh, yes, in relationship to this, going back to No. 4, it completely slipped my mind.

Q. (By Ms. Garrett) Excuse me, sir, Page 4 or Page 3?

A. No. 4 on Page 3, the July 14th communication, a letter showing the prices, and exactly how they were [39] worked out on the three items that we used, this is an example.

Q. Who was the letter to?

A. To Win Wilson.

Q. Are there any references to price communications on Page 4?

A. On Page 4, the same date, July 14th, there is a statement in there that says "Pooley, a national deal, cut prices." That's on Ball Brothers. Pooley is the president of Westernkraft, and he made a national deal with Ball Brothers, and we lost our business, and this is John Lawson, or Dave King, rather, is telling me that that is why they lost the business, because Pooley made a national deal. He was so informed by the customer, but there is no communication with Pooley about the thing,

or anything like that. There are no other references on that page that would seem to be pertinent.

Q. (By Mr. Abrego) This is Reference No. 9, Ron Yates, WYB—

A. Will call back, and Danville, Illinois is in the southern part of Illinois, and he was interested in the Quaker business at that location, and had submitted prices, and wanted to know if we were having any success in getting him some business. Ron Yates, by the way, is general manager of our Belleville plant.

[40] Q. (By Ms. Garrett) Any references to price communications on Page 5?

A. No, Page 5 consists almost entirely of our contracts with Interbake out of Richmond, Virginia, and what was subsequently written to the contract.

Q. And are the parties listed on it with your company?

A. Irwin Haydorn is listed there as Maxie, and Irwin Haydorn is the director of purchases for Interbake, and everything subsequent to that is what Haydorn said.

Q. Any references to price communications on Page 6?

A. No, there are not.

Q. (By Mr. Abrego) Now, let me ask you something. In prior testimony you said that you quit communicating in '74?

A. Late in '74, yes.

Q. These are all '75 forward, aren't they?

A. Yes.

Q. Would there still be communications in these notes, or things that would touch off in your mind a price communication with some of these notes you have here?

A. I have gone through them, and my own judgment is that there is nothing in them.

[41] Mr. Coffield: Your question, I think, is limited to the question of whether he had price communications. There are others in here, I believe, that are price communications that he's aware of, or someone communicating to him. I believe his answer was limited to—that is his prior answer was limited to situations where someone communicated to him, and he communicated back, or where he had initiated the communications, and he has testified that he did not have either of those two types in 1975, that the notes clearly contain, as he will indicate, conversations that he is aware about where price communications were going on.

Q. (By Ms. Garrett) Are there any references on Page 7, sir? Would you please verify that the page is double numbered that you are reading from?

A. Yes, I'm reading Page 7. I'm having difficulty with No. 10, Dick Cray, McMillan-Bloedell, Swift, Glendale. What I tried to do with that one, that is a communication with a competitor, but I was trying to buy some board from him. They had the facilities to make it for Glendale, Iowa, and we did not at the time, to supply the Swift account.

[42] (Off-the-record discussion.)

Q. (By Ms. Garrett) Okay, back on the record, Mr. Conboy, while we were off the record, in the earlier conversation with you and your counsel, you indicated several specific references in your steno pads as to price communications that took place, that you are aware of, and in the interest of time, we will touch only upon those specific ones mentioned, by the page, we'll refer directly to the steno pad, but we do have your assurance, do we not, that to the best of your knowledge, on the remaining pages, there were not indications of price communications with competitors, is that correct, sir?

A. To the best of my knowledge, that is correct.

Q. Please go, then, to the entry on Page 16. Will you explain the price communication there, and give us the date?

Mr. Coffield: Just for the record, Ms. Garrett, because the words "price communication" have been used, I think up to now, to refer to one where Mr. Conboy was involved—and I don't mean to quibble over words, but I would prefer if they would be referred to references to price communications, and then let him tell if he was involved in a [43] communication, because I think in prior testimony he gave he was not directly a party to a price communication as such.

Ms. Garrett: My comment was were those communications of which he was aware, whether or not he was involved.

Q. (By Ms. Garrett) Okay, on Page 16, if we can have a reference, what number?

Mr. Coffield: C-16.

Mr. Novak: No. 9.

Q. (By Ms. Garrett) Is that No. 1?

A. No. 9. 17 would be it.

Q. And we are on Page C—

A. Item No. 9, "R. Savage informed me that IP knows of our deal with Wilson Company." You had better put that, because we are talking about Win Wilson, and this is Wilson Company. What he was telling me there was the fact that we had gone and made a specific deal with Wilson, and before the thing practically hit the street, why, IP was aware of it. IP being International Paper Company. Where he got his information, I don't know. The next sentence tells us, or the next one, No. 10, that there was a wire came out of Oklahoma City that is the headquarters of Wilson & Company, to all of their buyers in their respective plants, informing [44] them of the new deal that we had with Wilson &

Company, and that's how IP found out about it, through Wilson & Company.

Q. Would that also be true, then, of Item No. 9, if it was going to go chronologically, probably they would have reversed?

A. It's just that I got one phone call ahead of the other.

Q. So then Mr. Savage talked with someone at IP?

A. No, IP learned from the Wilson buyer that we had a deal, and how Mr. Savage got the information that IP knows of our deal, I don't know that.

Q. All right, I didn't understand. Was Mr. Jensen an employee?

A. Mr. Jensen is general manager of our Cedar Rapids plant.

Q. And he gave you this information?

A. He gave me a message that Mr. Mel David had received a wire informing them of the contract.

Q. And do you know how Mr. Jensen came by this information?

A. From the buyer at Wilson Company.

Q. There is a Mr. Mannix also employed by Weyerhaeuser?

[45] A. He is not so employed now.

Q. Was he at the time of this entry?

A. Yes.

Q. And what was the date of this entry, sir?

A. July 18, 1975.

Q. All right, so these events are the 1975 communications that we are talking about?

A. Right.

Q. Would you please explain the entry on Page 61?

A. Okay, obviously referring to No. 6 on Page C601, date of 7-10 of '75, the first reference there is a cost study, Cedar Rapids, versus Rockford. Their operating

return seemed to be somewhat different, so we had a discussion about running a cost study to see if the charges were all the same.

Q. Pardon me, who is the "we" that had this discussion?

A. Bob Savage and myself, and in each case where he is referenced in the beginning, unless there has been—I know differently, why, that will be the case. Then it says here "Dixon go to Karl Kiser." That is going back once again to the Downing versus Weyerhaeuser deal on the Quaker, Rockford business that we spoke of before, that I had sent a letter and verbal communication to Win Wilson about that we did not cut Downing's [46] price. Mr. Kiser contacted Bob Savage and referred again to the fact that he felt we had cut his prices. Savage was not aware of what was going on in the situation, and during this conversation he said that since Dick Dixon was aware of it, he ought to get to Karl Kiser and explain the situation to Karl Kiser. Karl Kiser being the sales manager at Downing.

Q. So Mr. Savage then directed Mr. Dixon to contact Kiser?

A. He suggested. He couldn't direct him, because, you know, they weren't—he wasn't his boss, but he suggested it would be a sound idea. Whether he ever did, now, this is a conversation between Bob Savage and me, and I know he told Dick that he should see Karl Kiser, and subsequent to the conversation I asked Dick Dixon if he had ever gotten in touch with Karl, and he said no, he tried a couple of times, and he couldn't get in touch with him, so to hell with him, let him come to him from now on, and I never did pursue the thing any further.

Q. All right, would you explain the references, if any, on Page 94? It should be in the second book. C082.

A. This one, I assume that we were all referring to Item No. 2 on C082. Okay, at this time we were [47] negotiating a contract with Fairmount Foods. One of the large Fairmount locations is in Raleigh, North Carolina. We had previously supplied the business some years back, but because of the fact that they had warehousing requirements, we could no longer supply it. Gaylord took the business over. We were invited back in to quote for 1975-76 business, and we were informed once again that we would have to warehouse it. Dan Rudolph is saying he can't physically get in a warehouse, and he wanted to know if we could work on a five-day lead time and supply two or three items per truck. Gaylord cut the original price that we had when we ran the business, and it made the return of the business so low that we couldn't afford to pay for a warehouse. The price here says we can't compete with Gaylord because of that fact. Gaylord is in Raleigh, and warehoused in their own plant, so they didn't have any out-of-money cost, or out-of-pocket cost on the thing, and "Okayed to give five percent and one percent, . . . 59 net 60 at this time." The five percent stated what we would give to Fairmount based on a certain dollar volume of business, we would give them a five percent commercial allowance when they exceeded $250,000.00 worth of business. The one percent, 59 net 60 was the terms of sale. In other words, our standard terms of [48] sale for the industry or one percent, 10, net 30, and we were extending to Fairmount a one percent, 59 net 60, which gave them the opportunity to use our money for a long time.

Q. Is that the sum and substance of this communication?

A. Yes, it is.

Q. Is there any implication of a price exchange or price communication in Item No. 3?

A. No. This has to do with dealing with the same contract. Fairmount also had a division called Cass Foods in Centralia, Illinois, and the statement here is that "Board is moving up January 1, 19—" It should be 1976. It says "1975" here. The rumor was if we were going to make an allowance for price, why, Ron Gates was to be covered, but at present he would go three percent. At this time IP had made an announcement, International Paper had made an announcement, and OI followed it immediately with an announcement that Board was going to 215. It was published in the Wall Street Journal back in 1975, and that was the reference to the fact that OI was moving their board. OI later retracted it.

Q. And the date of communication with Mr. Rudolph was October 31, 1975, is that correct?

[49] A. That's correct.

Q. (By Mr. Abrego) Who is Mr. Rudolph?

A. Dan Rudolph is general manager.

Q. Did you talk to anyone from Gaylord concerning this account?

A. No, sir, it wasn't necessary to talk to anyone from Gaylord. Fairmount gave me the prices that I would have to meet.

Q. (By Ms. Garrett) Explain, please, the reference on Page 94.

A. What is the item on 94? I don't see anything. Okay, it's Page 95 of the same date, November 18, 1976. This is a communication I had with Jim Flavin, who was at that time national account manager in the southern region, and he said that Fred Renshaw, who was vice-president of sales at Alton Box, called Tom Gordon, who was southern regional manager of Weyerhaeuser, and said that we cut the price at Smackmaster in Jeffersonville, Indiana, and Mr. Flavin

was wondering if Fairmount Foods bought for Smackmaster, or—that's Snackmaster, not Smackmaster. I'm sorry, Snackmaster, and Fairmount Foods, and there is none, and I had no knowledge of what he was talking about. The numbers on that page, $236.00 versus $283.90 is evidently the price, obviously the price that Fred Renshaw said we had put in at [50] Snackmaster versus Alton's price of $283.90.

Q. Mr. Renshaw is the Alton Box employee?

A. Yes.

Q. And the telephone communication was between him and Mr. Gordon of Weyerhaeuser?

A. Yes.

Q. How did Mr. Flavin—

A. Mr. Gordon and Mr. Flavin were at that time in the same office, and I have had many communications with Flavin, and knew him well for a long period of time, whereas my relationship with Gordon is not as close.

Q. Is that the only reference to a price communication on Page 95?

A. Yes.

Q. Would you please explain the reference on Page 104?

A. Okay, the reference is really on Page 105. It's Item No. 6.

Q. It refers to which date, please?

A. December 11, 1975.

Q. All right.

A. Chuck Joyce, who was sales manager at the time for Westerncraft, called me and asked what we were going to do at Miles Lab, and Michigan Fruit, and I [51] informed Mr. Joyce that I was not on the phone, and could not have any communications with him.

Q. Did he call you subsequent to that?

A. No, sir. No, ma'am, rather.

Q. Is that the only reference to a price communication on Page 105?

A. Yes, that I can see.

Q. It continues on the following page.

A. On Page 106, No. 15, there is a conversation with Jack Mannix, and he refers to Michigan Fruit in this, and he said he needs relief on the 1240 six-ounce can box. That's the size of container that he was to go up six percent on it, on the 15th of January, 1976, and the other thing, the next line says, "Bob Savage says everybody must be up by 1-1-76," Savage being the boss said, "All your prices will be raised." Now, my conversation with Mannix on this one, it was not made expressly for the Michigan Fruit. There were a lot of other items, but during the course of the conversation Michigan Fruit came up, and I informed him that I had gotten a call from Chuck Joyce on the thing.

Q. And when did you tell him about the phone call from Mr. Joyce?

A. I told him just that Chuck had called and wanted to know what we were going to do in the account, [52] and I told him that we were off the phone.

Q. Do you know whether Mr. Mannix talked to Mr. Joyce?

A. No, I do not.

Q. (By Mr. Abrego) Now, when Mr. Joyce called you, did he talk to you in terms of percentage of increase?

A. No, he said, "What are you going to do?" We were the leader in the account, and they would have followed our lead if I had told them what we were going to do.

Q. Did he suggest to you what he was going to do?

A. No, I wouldn't talk to him that much.

Q. You just told him, "We are not talking," and that's it?

A. That's it.

Q. That was the only conversation?

A. Yes.

Q. What was his reply to that?

A. He understood, because most people—the reason Chuck probably called me was that we used to work side by side. He was a former Weyerhaeuser employee, and he might have tried to get some information from other people at Weyerhaeuser. I don't know [53] this, but seeing as how I was an old friend of his, he thought perhaps I would be a good source for him to get some help.

Q. He didn't suggest how much he was going to go up?

A. No, not that I recall.

Q. Do you know how much he went up in relation to your six percent?

A. No, I don't even know how much we went up. It was not an account in which I had an interest. It wasn't a national account, it was a local account.

Q. When you told Mannix that Joyce had called you, did he say, "I'll take care of it"?

A. I don't recall what his reaction was, to be perfectly honest. I don't think he did, because I doubt if he would have expressed, even to me, that he would make a phone call to a competitor. Within our company, things at that time were very tight, and not any of us were supposed to be on the phone.

Q. (By Ms. Garrett) Mr. Conboy, that date continues on to Page 107. Are there any references to price communications on that page?

A. No, there aren't.

Q. Would you please explain the reference on Page 114?

[54] A. Okay, this is the 114. It's No. 1. I'm inclined to think that it is a date. I don't know what date it gives. I don't have a date on it.

Q. Is there some way from your notes that you could ascertain the date?

A. Well, it has to be subsequent to January 15th and before January 27th.

Q. Page 111, which is the last date I see, has January 15, 1976.

A. Right.

Q. Judging from the notes, does that sound about accurate with respect to the entry that you made?

A. The entry on Page 114?

Q. Right.

A. No, it would be subsequent to that, because I have a No. 1 down here, so this would be like the first call that I took on this day.

Q. All right, that didn't copy on mine, so it was after January 15th?

A. And before the January 27th date.

Q. And what is the reference in Item 1?

A. Well, we are discussing what we are going to do with the Libby business, and west of the Rockies is a sort of a whole different deal out there, and Mr. Murray informed me that—I don't recall what we [55] had planned to do with Libby, but he told me that all cannery cases were going up six percent April 1, 1976, Fiberboard is going to announce later than that date.

Q. How did Mr. Murray know that Fiberboard would announce?

A. I don't know.

Q. (By Mr. Abrego) Who is Mr. Murray?

A. Blaine Murray is the general manager of our Alameda plant in Alameda, California.

Q. How would he know this information and you not know it?

A. Well, I wouldn't know anything about what was happening on the west coast.

Q. (By Ms. Garrett) That note continues on to discuss St. Regis. What is that about?

A. Well, Fiberboard is well known in the business world that they are disposing of their folding carton and shipping container plants. Fiberboard is a supplier of Libby, McNeil and Libby at Sunnyvale, California. Murray is telling me that Fiberboard is up for sale, therefore he doesn't feel that they are a viable supplier to Libby. It is rumored that St. Regis is going to buy them. Fiberboard is $28 million short in ecological compliance. They sold their highway and plant for $400,000.00, and says here Fiberboard is behind other [56] mills in their labor rates, and they expect that there is going to be a long strike, the Fiberboard plant, in their mills.

Q. In other words, that is not a price communication?

A. No, what he was giving me was information that I was supposed to take back to Libby and persuade that Fiberboard is not a viable supplier, that they should be replaced by Weyerhaeuser in that particular account.

Q. Would you explain the reference, if any, to price communications on Page 120?

A. Okay, on Page 120, dated February 9th, Item 2 is a communication with Ray Beatle, who is the sales manager at the Alameda plant, for which Mr. Murray is the general manager, and there was a question came up about supplying warehouse space for the boxes at Sunnyvale, and Beatle is telling me here that the space that they have set aside for their can storage is too large, and they can store boxes in that space, and that they would be willing to pay them for the storage space that would be used for our boxes in there. Then we go down to No. 5, and Blaine Murray says here that the warehousing

deal is off, meet the Fiberboard prices. Everybody is going up six percent. The Fiberboard prices that I had to meet were the prices that were given to me [57] by Ken Brown, who is a purchasing agent for Libby.

Q. So Mr. Murray gave you instructions to meet the Fiberboard increase?

A. He gave me instructions to meet the Fiberboard prices, with the instructions that built into the contract will be a six percent increase as of April 1st.

Q. Did you in fact meet those prices?

A. Yes.

Q. Did Mr. Murray's directive come from some other source? Was he simply passing on a directive from some place else?

A. No, that was his prerogative to do what he did, and once I got the prices from Libby and saw that he was perfectly willing to meet them, the prices were given to me by the customer.

Q. Would you explain the reference on Page 148?

A. Okay, on Page 148, dated April 14th, Item No. 4 is a communication with Bob Savage, and he is telling me there that at Larson Canning, where we were the major, if not one hundred percent supplier, that Inland had cut their prices considerably. He used the word "clobbered," and their salesmen were out in the field telling all cannery accounts that they were going to cut the prices six percent.

Q. How did Mr. Savage find out about this?

[58] A. From the salesman who called on the cannery accounts, the people would tell them that Inland is going to cut prices six percent. Then he's telling me in the next sentence that levels in Wisconsin now eight percent off Wisconsin can lists. All cans, no matter who put them up, they are all the same size, like a can of peas, the sixteen-ounce can of peas is called a 303 by 406. It's

three and three-sixteenth inch in diameter, and four and sixteenth inch in depth, so if you put twenty-four of them in, regardless of who puts them up, the box is going to be the same thing. In our business we do not have too many commodities as such, but the can list can be called a commodity, because everybody who makes 303 boxes makes it the same. It's a hundred and seventy-five pounds, so this was a Wisconsin can list put out that went to all the box shops, the makers of boxes, and the buyers of boxes all would get a copy of this, and it was called a commodity list, and it gave the prices of the boxes. It pertains principally to Wisconsin, Minnesota, and the prices, he is telling me that the boxes are now being sold eight percent off that list, off the published list.

Q. (By Mr. Abrego) By who, Weyerhaeuser?

A. By Weyerhaeuser, yes. We were eight percent [59] off, which was a great surprise to me at the time, because I didn't know it.

Q. (By Ms. Garrett) Did Mr. Savage tell you whether or not he called Inland to complain about this cut?

A. No, he did not. Well, I know he didn't on that. I feel fairly certain he didn't.

Q. (By Mr. Abrego) Did you call Inland?

A. No, sir.

Q. Do you know of anyone who might have called Inland to complain about this?

A. No, I don't.

Q. (By Ms. Garrett) Would you please explain the reference on Page 144?

Q. (By Mr. Abrego) Wait a minute. What did Mr. Savage want you to do about this eight percent off the list?

A. Well, the reason I was interested in that was the fact that at the time all this was going on I was negotiating a contract with Stokely, and I was negotiating based on the list that was put out, and I was being told by my customer that, "Hey, I have prices that are considerably lower than you are putting in," and I was verifying with Savage through this conversation that there was a break in the commodity list up there, [60] and that I was sort of out on a branch by myself. The reference on Page 144, date of April 5, 1976, Item No. 7, I'm trying to think of who NCC Foods is. We sell boxes. Cannery boxes are sold plain. If they are printed, there is an up-charge for printing one color, and an additional up-charge if they are printed two colors. The west coast was $3.05 for a one color, and something like five fifty for a two-color job, and that was standard for all cannery boxes on the west coast, and John Savage is telling me here that at NCC Foods, that Longview had gone in and went to two seventy-five for one color, plus another dollar fifteen for a two-color box, and they met that situation, but outside of that, everything else was going at the same level, or the standard up-charge for printing boxes. He probably got that information directly from NCC Foods, and we were told that we had to meet that price or we were going to lose the business.

Q. (By Mr. Abrego) Do you know that he got that from NCC Foods?

A. I don't know it for sure.

Q. Could he have gotten it from another competitor?

A. I can't say that he could not have gotten it from a competitor, but it's hardly likely that a [61] competitor would say, "Hey, I just cut your price." I mean that Longview would call and say, "I just cut your price." He was probably told by the customer, and that we would have to do the same.

Q. (By Ms. Garrett) All right, Mr. Conboy, you have gone through ten of the references out of two of the seven steno pads which are counsel's submitted to us. To the best of your recollection, these are all the price communication references to be found in all seven of these notebooks?

A. I have gone through and reviewed these by myself, and also with counsel, and to the best of my knowledge, at the present time, these are the only references that we could find that could be questionable.

Q. (By Mr. Abrego) In your notebook there you have, for example, Joe Kurpeal, several times. You have got his phone number, and you have Mr. Muyskens' name several times, and his phone number. What are these in reference to?

A. Joe Kurpeal is the sales manager of our Closter plant, and the reason I wrote the phone number down is I have to look it up the first time.

Q. This is not the Kurpeal that worked with West Vaco?

A. He is the sales manager of our Closter, [62] New Jersey plant, and when we go east, when he wanted the lead number to get into the east there, this is a prefix number, and his own number, and I just can't remember them, so that's why I write the numbers down, so I won't have to look it up.

Mr. Coffield: Just for clarification, Mr. Kurpeal did work for West Vaco at one time, I believe, and now is an employee of Weyerhaeuser.

A. I was not aware that he came from West Vaco.

Q. (By Mr. Abrego) Who is John Muyskens?

A. Johm Muyskens is our sales manager at Minneapolis, and he formerly worked for IP.

Q. (By Ms. Garrett) Those references to both of these men refer to the time they were employed by Weyerhaeuser, and not with competitive companies?

A. That's right, yes.

Q. Mr. Conboy, before we take a short break, I'm going to give you a list of corrugated companies for you to review with your counsel, and try to call out any price communications that you might have had with competitors, or that you are aware of. If there is some overlap, let us know, and if there are additional names, and we would like full details, and to make sure you understand price communications, for the purposes of [63] this investigation, it's defined as any communications, discussions or exchange by any means, be it telephone, meeting, or chance encounter, price information of any nature about specific prices to specific accounts, general prices, price increases, percentage price increases, date of price increases, or pricing formulas to any competitor, or seller of corrugated products.

A. Yes.

Q. Is that understood?

A. Yes. What time frame are we talking about?

Q. We are talking about the time frame of 1974.

(Off-the-record discussion.)

Q. (By Mr. Abrego) Let's go back on the record. Okay, Mr. Conboy, I direct your attention to Page C032. There is some questions I have got.

A. Yes.

Q. Okay, this page was torn. Do you recall why it was torn?

A. There are times when I will put down sizes, or it could be "Get a loaf of bread and a quart of milk," or something, a communication with my wife that I would tear off.

Q. It had nothing to do with the Notation No. 2 there between Mr. Catlin, Mr. Allen and Mr. Savage?

A. No. What that is is an announcement at the [64] time that John Catlin had previously been general

manager at Detroit, had been given a new job in marketing services, and moving to Tacoma, and Doug Allen, who was the sales manager was succeeding him as general sales manager, and Ken Mraz was becoming sales manager.

Q. All right, in your books here do you have any reference to any communications with or by Mr. Catlin?

A. No. In later ones, there may be, but Catlin became—I don't know how to say this—he was put in charge of machinery and things like that when he went to Tacoma, and most communications that I would have that had to do with machinery, I would be dealing with the engineers, so-called, that worked for him, rather than with John Catlin.

Q. Are you aware of any price communications that Mr. Catlin had that may be covered in these notebooks you have?

A. No, I'm not aware of any at all.

Q. Okay, would you look at Page C034, Item No. 9, "Jim Flavin, Mount Vernon, Coca-Cola all screwed up." What does that have reference to?

A. Well, Mount Vernon, they were supplying Cokes in Columbus, Ohio, and they just weren't putting in a quality product. They had the account all screwed up and they were about to be thrown out.

[65] Q. Was there any communication with OI on this account, that you know of?

A. No, not that I'm aware of at all. I don't even know that OI was a supplier there. I have no familiarity with the thing.

Q. Did you have any communications with Mr. Kurpeal before April of 1976 with regard to pricing?

A. No, I never had—I don't know when Kurpeal came to work for Weyerhaeuser, so I hesitate to answer as a specific date, but I never had any knowledge of

Mr. Kurpeal's existence, even before he became a Weyerhaeuser employee.

Q. How about with Mr. Muyskens?

A. No.

Q. Who did you have price communications with at Alton Box Board?

A. Fred Renshaw, and there is another fellow there whose name was Herman.

Q. Dick Herman?

A. Dick Herman.

Q. Mr. Renshaw was in national accounts?

A. He's a vice-president of sales. Dick Herman is national accounts, I think.

Q. What account did you speak with Mr. Herman on?

A. It goes back so far I cannot pinpoint the [66] account.

Q. Do you recall when these communications were with Mr. Renshaw?

A. Mr. Renshaw, it was in the period from '68 through about '72, and then after that all calls were directed to Dick Herman.

Q. What was the nature of your conversations with Mr. Renshaw?

A. It was a discussion of price on specific pieces of business.

Q. Would that have been specific prices for specific items, or general percentage of increase?

A. It would have been both or either.

Q. Was this a two-way communication where he called you and you called him?

A. Yes.

Q. And once you got this information, what would you do with it?

A. Use it for—in most instances probably use it for a basis of pricing the piece of business that was under discussion.

Q. How would your quotations of your prices compare with his after you had gotten information from him?

A. Well, there are a lot of ways to do it. What [67] I usually did was as he gave me a price, say, $100.00 for a box, I would not ever go in with $100.00 or $100.50, or $98.75. I usually went in at a setup, lowered the price of the box, but add a setup per thousand boxes, so that our prices would come out to be comparable.

Q. Would your prices be at or above his prices?

A. They would be slightly above or slightly below.

Q. Within a range that would not cause the purchasing agent to go either way, or to drop him as a supplier and come on with you?

A. If the purchasing agent computed his total prices, it would not. If he bought boxes by the thousand and didn't worry about the setup price that he was being charged by Weyerhaeuser, then the prices would be sufficient so that they could drop Alton.

Q. Would this be, in your estimation, honoring his market, or honoring his prices?

A. Yes.

Q. When you discussed percentages of increase, would you agree as to a percentage of increase for a given account?

A. Well, there was not a statement made that said, "Okay, we'll go six percent, or ten percent," or [68] whatever, but if there was an agreement, it was sort of a tacit agreement. If there wasn't an agreement, he would be informed that no, that wasn't satisfactory, we are going to go some other percentage.

Q. So if you didn't agree with him, you would let him know, otherwise you followed it?

A. Just accepted it, you know, without any—there was no ceremony of yes, we honor you, and all that.

Q. Would he do the same thing to you?

A. Yes.

Q. Do you recall what account you spoke with Mr. Herman on?

A. No, I don't, because most of the time that there was conversation with Herman it was during the McNaughton era, and by this time, why, McNaughton was doing most of the calling, because he chose to do so, and my conversations with Dick Herman, most of the time I was really taking a message from maybe a previous conversation, or something like that, to pass on to McNaughton.

Q. He would give you prices to pass on to McNaughton?

A. Yes.

Q. What period of time did you talk with [69] Mr. Herman?

A. In '73 to early '74.

Q. Did you talk to him frequently?

A. No, there wasn't. In that period of time I didn't talk to Dick Herman five times.

Q. And did you honor his prices and he honored yours?

A. Yes, as far as I know.

Q. Did you speak to anyone else at Alton?

A. Forrest Bornegrebe. Now, that's one that's going to grab you. B-o-r-n-e-g-r-e-b-e.

Q. What accounts did you speak with Mr. Bornegrebe on?

A. Wilson, Quaker, and that's about it, I think.

Q. What period of time did you talk to Mr. Bornegrebe on the Wilson account? Is that Wilson Meats?

A. Wilson Meats, yes. Wilson & Company, I'm sorry. Oh, in the period up to about 1973. He died then.

Q. Would you exchange and honor prices?

A. Our conversations were fairly general. We did not exchange specific numbers, but we talked, "This is what should be done in this account," and a percentage, perhaps, but we never talked any specifics.

[70] Q. When he gave you a percentage of increase that should be given this account, would you usually follow that increase?

A. No, not always.

Q. Did you have the equity, the majority equity in that account?

A. Yes, we did.

Q. When you gave him the percentage of increase, did he usually follow you?

A. Well, in both of these accounts he would have no choice but to follow me, because the account itself would lead him into the numbers regardless of what he did. Even if he was law, he had such a small equity in the account, which especially Wilson, they would say, "You have got to go back and figure your prices, you're four percent higher than IP, Hoerner, Downing and Weyerhaeuser," and they did the same for each of us in turn as we submitted prices.

Q. When did you talk to him on Quaker Oats?

A. It was probably before the quotation that was to be submitted for the business beginning July, 1973, to June 30, 1974.

Q. So you talked to him in '73?

A. Yes.

Q. What was the substance of this conversation?

[71] A. He wanted to know what we were going to do, and I told him.

Q. Okay, did he follow suit?

A. Well, once again, Quaker is the type of account where he would have to follow suit. He would be told to do so by the customer.

Q. Did you talk to anyone else at Alton Box?

A. No.

Q. Are you aware of anyone else at Weyerhaeuser talking to anyone else at Alton concerning prices?

A. I'm not aware of any, but on a local basis things could happen that I would not be aware of.

Q. Was Mr. McNaughton talking to anyone at Alton?

A. He would be talking to the same people that I was talking to.

Q. How about Mr. Savage or Mr. Wilson?

A. I don't know of them having any communications with Alton.

Q. Who did you have price communications with at Boise-Cascade?

A. I don't ever remember talking to anybody at Boise-Cascade.

(Off-the-record discussion.)

Q. (By Mr. Abrego) Who did you have price [72] communications with at Acorn?

A. A fellow by the name of Tom Kigin, and Francis--for the life of me, I'm drawing a blank on names today. I can't think of Francis' last name. He's the sales manager.

Q. Where is he located?

A. In Chicago. It's an Irish name.

Q. Is Kigin also in Chicago?

A. Yes.

Q. What accounts did you talk with Mr. Kigin on?

A. Libby, Quaker.

Q. Any others?

A. No, not that I recall right now.

Q. What accounts did you talk—

A. The same with Francis.

Q. Were they going on at the same time?

A. Yes.

Q. What period of time is this, now?

A. Oh, this goes back a long time. 72-73.

Q. Okay, what was the substance of your conversation with Kigin?

A. Informing him what we plan to do. They weren't in either one of the accounts, and they were getting opportunities to quote on it, and letting them know what we were planning to do in the account.

[73] Q. Did he call you, or did you call him?

A. It could have been either or both.

Q. Did he quote on this account?

A. I would not know whether he quoted. I can tell you that if he did, he was never successful in getting any business.

Q. Do you know if he honored your prices?

A. I don't know.

Q. Did you give him prices?

A. Yes.

Q. The same on Quaker Oats?

A. No.

Q. What was the Quaker Oats' situation?

A. I don't recall how it worked. I know it was on business that was to be supplied to Rosemont, Illinois. That was the only plant that they were in a position to supply, and it's so long ago, I'm sorry, I just cannot recall.

Q. Would this gentleman by the name of Francis also call you on Quaker Oats?

A. Yes.

Q. Can you recall specifics where he was involved?

A. Well, they were probably simultaneous actions.

Q. Did you talk to anyone else at Acorn?

A. No.

[74] Q. Who did you have price communications with at Bell Fiber?

A. A fellow by the name of Stormy Pfohl.

Q. Anyone else?

A. No.

Q. All right, he's a canner person?

A. Yes, he is vice-president of sales, but it was about a cannery price. Not a specific account, but up unto about 1970 there was published a list called a Sanitary Can List, similar to that Wisconsin Sanitary Can List, and the conversation I had with Stormy Pfohl, the prices far exceeded the last published list, and he said he was at-list plus, and this is just a number, a twenty-two percent, or something like that.

Q. Did he want you to up your price list?

A. No, we were all in about the same area, because once again, the canners, if you are not in line, why, they tell you and get you in line.

Q. Why have the can list out if he was at list plux X percent?

A. Well, the list had ceased to have any—the list never really did have any value. Why it was published was always a great mystery. In fact, the very last list that was published, it was always published by Weyerhaeuser Company. We published the [75] Sanitary Can List, and Container Corporation used to publish a Beer Can List, and there were many commodity lists in the industry that are no longer in existence and that was the last one that was put out. We even put a black cover on it, hoping that the cover would be significant, that it would be the death of the list, and it was.

Q. The last list came out in '72, though, didn't it?

A. I think we published one list after McNaughton came in, McNaughton came in in '71, so it could have been early '72 that the last list came out. I don't recall. I still have copies of it with the date on the top as to its effective date.

Q. So other than letting you know that he was at his plus X percent, what was the substance of the phone call?

A. Well, that was it, that he was selling his cannery cases at list plus that X percent.

Q. Why did he want you to know that, or why did you want to know that?

A. Well, so that we would have the same prices, or at least in the neighborhood of the same numbers.

Q. Did he send you a price list? He continued to publish his price list?

[76] A. I never saw a price list published.

Q. Do you know if he continued to have conversations about price lists on canner accounts, Mr. Mannix?

A. I don't know.

Q. Did Mr. Mannix ever tell you?

A. Not that I can recall. He never did know—I only met Stormy Pfohl one time, and this was not a telephone conversation, by the way, it was a face-to-face meeting. I met him at a meeting.

Q. An FBA meeting?

A. Yes, and after the meeting we were having a drink, and that's when he told me about that.

Q. Were you in line, or did you have to come up or come down, or what?

A. No, I don't recall whether we were in line or anything, but we did not alter our prices to meet his in any way, that I'm aware of. He was not a principal factor in the business in which I was most interested, that being the can business, Libby and Stokely.

Q. Did you make up that price list?

A. Well, I increased it. In other words, I got it. I took it over. It had been in existence, and then each time a general price increase was announced for the industry, why, I would add the eight percent, or whatever, and

then have it printed and distribute it to [77] the competitors.

Q. Competitors?

A. Competitors, and also to can box users.

Q. Would you send it to your competitors first?

A. It was a simultaneous mailing. We had a mailing list.

Q. Being that you were the larger, one of the larger companies in the area with can boxes, you pretty well set the market there, didn't you?

A. No, I don't think anybody set the market. If I might cite a specific instance, take Libby, they have, say, fifteen locations, and they send their inquiries out to many customers. We were their principal supplier, supplying perhaps sixty-two percent of maybe $5 million worth of business. Less than that. What Libby did after they got all of our prices back, why, we sat down, and we would take a specific location, and, say, Janesville, Wisconsin, and they would say to me, "Well, your buy at Janesville is ninety-eight thousand, and the next competitive buy we have is seventy-four, or eighty, or something like that, and do you want to make an adjustment in your prices to meet the competitive level," so I had the option of either so doing or not doing. If I didn't do it, I would have lost the business, so we would make the adjustment, [78] which shows that we weren't setting any market. We were more or less meeting market, and the same is true today. I can't even go in and set a market for the smallest guy in the world. Weyerhaeuser could not influence him that much, if he wants to sell his boxes for less than we do.

Q. Who else did you speak to at Bell Fiber?

A. That's all.

Q. Do you know Mr. Howard East, or Paul Vannette?

A. No.

Q. Were you aware of anyone else at Weyerhaeuser talking to anyone else at Bell Fiber?

A. No.

Q. Who did you have price communications with at CCA?

A. There was a man there who has since retired that I had communications with. I can't think of his name. After he died—or he retired, I'm sorry, I had conversations with Joe Kilkullan, and I can't think of the man's name.

Q. What position was he in?

A. He was national accounts. It's like a four-letter word.

Q. Is it a good four-letter word, or a bad four-letter word?

[79] A. My mind is not running on the bad words today. I will have to wait until after five o'clock to go along those lines.

Q. Where was he located?

A. In Chicago.

Q. Harold Stringer?

A. No.

Q. Jim Fig?

A. Jim Fig.

Q. When did you talk to Mr. Kilkullan?

A. When?

Q. Yes.

A. For a period of years, up to about early in 1974, I would think. It was when he called me and said that they were no longer on the phone.

Q. What accounts did you discuss with him?

A. Oh, gee whiz, many accounts. When I say "many," I don't mean a hundred, but I mean like six or seven. I can't recall specifically at present what accounts they might have been.

Q. What was the nature of your conversations with Kilkullan?

A. Either to get his past markets, or to let him know what we were going to do with it in a given account.

Q. Percentage of increase?

[80] A. Yes.

Q. Would you also call him for that type of information?

A. Yes.

Q. And once you got that information from him, would you honor that market or percentage of increase?

A. Yes.

Q. And would he do the same, as far as you know?

A. As far as I know, he would.

Q. Did you ever have any meetings with Mr. Kilkullan?

A. About business, no.

Q. All these communications were by telephone?

A. By telephone.

Q. Did you ever exchange any price lists or formula lists with him in the mail?

A. No, I don't believe I did with Joe.

Q. Who was aware of your communications with Kilkullan?

A. Well, when the communications originally began, there was a fellow by the name of Ed Grain, who was the vice-president of our region, and it was at his behest that I began the communications, and then he was succeeded by Bob McNaughton.

Q. Did Savage know about this?

[81] A. He could have been aware of it, but he was not directly involved in anything.

Q. Did you have any communications with him in 1975?

A. Joe Kilkullan?

Q. Yes, sir.

A. No, Joe Kilkullan is a personal friend, and he is from Scranton, Pennsylvania. We used to date sisters, but we had no business communications. Joe Kilkullan shut off the phone a long time ago, in 1974.

Q. These accounts that you were communicating on, were you competing head to head at each location?

A. Well, I would say we would almost have to be competing. Otherwise, there would be no value to the information.

Q. Were there ever any instances that you communicated with Kilkullan, or any of the gentlemen that you talked about, where you did not compete in all situations, in all locations?

A. Yes. You mean like, say, they were only going to be a supplier at three Libby plants instead of ten?

Q. Right.

A. Yeah, that is entirely possible because of the physical locations of some of their installations, they would not be interested in a given location of a customer.

[82] Q. Then when you discussed percentages of increase, the effect was this would stabilize the entire account, as opposed to just specific locations?

A. Yes.

Q. What accounts did you discuss with Mr. Fig?

A. He was involved in the Quaker account, and in about 1973 Quaker had quiet—it couldn't have been '73, it had to be '74 Quaker had one of those years. Quaker had a large reduction in prices, and Fig asked if I was going to meet the numbers, and I said yes, and he said that they were not, and they subsequently lost the business.

Q. Who was the competitor that came in there and cut that account? Do you recall?

A. No, not that one.

Q. Was it Inland?

A. No.

Q. Is this in reference to that big fight that occurred in your industry over this account?

A. Big fight?

Q. Yes.

A. I'm not aware of any big fight in our industry over that account.

Q. Who were the major suppliers of Quaker in 1974? [83] A. Weyerhaeuser, PCA, and IP, I think, had a pretty good piece of business at that time.

Q. Wasn't there a lot of ruffled feathers by IP, somebody stepped on IP's toes, and there was a lot of retaliation and cutting the prices?

A. No.

Q. It might not have been '74.

A. No, this is '76.

Q. '76?

A. That that happened.

Q. Okay.

A. IP, I just finished paying for their June of '76 damage just this past week.

Q. So what was the results of him telling you that, or Fig telling you that he was not going to meet their price? What import did that have to you?

A. It didn't mean anything to me, because they were not supplying any of the locations that we were supplying. They were supplying at that time New Brunswick which has since closed, and they lost their New Brunswick business. We had a little piece of New Brunswick, not very much of it, and he just said that he wasn't going to meet the price back there.

Q. Was this relative only to New Brunswick, or to the entire account?

[84] A. Well, it was relative—I mean it was relative specifically to New Brunswick. They, of course, were trying to become a participant in the entire account.

Q. Okay, what I'm trying to find out is if you stood your ground only at New Brunswick, it wouldn't have an effect on the other locations, the rest of the account that he was trying to get to, whether you were going to lower your prices to the entire account, or just to that particular location?

A. He was just informing me what they had done, that they had gone in and refused to lower theirs, and he asked what we did, and I said that we had brought ours down, we brought it down generally on every location the same percentage.

Q. Was he trying to enlist your help not to bring it down at all on all occasions?

A. No.

Q. What other accounts did you speak to Mr. Fig on?

A. At this moment, I don't recall any others. On Kilkullan, at one time I was asked by Ted Fajen to get in touch with Joe and find out what he was going to do at Schlitz.

Q. And did you?

[85] A. I called Joe, and his answer was evasive, and we wound up he was going to be in contact with Fajen direct. Whether he ever did or not, I don't know.

Q. And when was that?

A. This goes back to about 1972, way back.

Q. Did you talk to anyone else at CCA, other than Mr. Fig and Mr. Kilkullan?

A. Yes.

Q. Who was that?

A. It's all so long ago, I can't remember the man's name, and he is no longer with them, and you probably don't even have it. He was the manager at the time of the Carol Stream plant.

Q. What was his name? Do you recall?

A. No, I can't.

Q. What period of time was this?

A. Oh, this was back in '71, in that area.

Q. I had Kenton, and Schoen is the last name.

A. No, I'm sorry, it was a German name.

Q. Which manager was he, sir?

A. He was general manager.

Q. James Turner is the only general manager I have in that time period. What was discussed with this gentleman?

A. I don't recall the pieces of business, but we [86] discussed business that we had in common.

Q. Did you exchange pricing information with him? Is that your best recollection?

A. In all probability, we did.

Q. Would that be William Schaefer?

A. William Schaefer, that is right, a German name.

Q. And did you honor each other's information once you got it?

A. Yes.

Q. This was a two-way communication?

Q. Yes.

Q. How often did you talk with this gentleman?

A. Oh, maybe three or four times.

Q. Are you aware of anyone else at Weyerhaeuser talking to anyone else at CCA concerning prices?

A. No, I'm not. Offhand, I can't recall.

Q. (By Ms. Garrett) Who have you had price communications with at Continental Can?

A. A fellow by the name of Alexander.

Q. What is his title?

A. He was regional manager. This was in the period '72 and '73.

Q. Do you recall the account or accounts involved?

A. No, I don't. I don't recall the account, but [87] it was a case of informing Alexander that we were going to move a certain percentage on certain pieces of business.

Q. Did you call to let him know, or did he call you to find out?

A. Both. Most of his communications were with McNaughton, that I became involved.

Q. Were these all telephone communications?

A. All but one time, I saw him at a meeting, and we discussed some things that had previously been discussed with McNaughton, just a rehash of old information.

Q. What kind of meeting was this?

A. An FBA meeting.

Q. And after you ceased talking to McNaughton and McNaughton talking to you, did you let him know about these communications?

A. It was not a case of him ceasing to talk with McNaughton. He always did talk to McNaughton, and occasionally, why, McNaughton would ask me to call him, and I would call him and pass on the information that I was requested to do so.

Q. Was McNaughton consistently aware of your communications?

A. Yes.

[88] Q. Was anyone else aware?

A. I can't think of anyone else who would be aware, except McNaughton.

Q. About how many times did you talk to him in that period?

A. Oh, maybe a half a dozen.

Q. Did you talk with anyone else there?

A. Not at Container or Continental Can, no.

Q. Did anyone else at your company talk to Continental?

A. Not that I'm aware of.

Q. Who have you had communications with at Corco?

A. Beaton Pettigill.

Q. Which account?

A. Kerr Glass, Dunkirk, Indiana.

Q. Do you recall when that was?

A. Probably in late '72, or early '72, or '73.

Q. And who initiated the communications?

A. I don't recall. I think that communication was initiated by Bob McNaughton.

Q. Would you explain the circumstances?

A. Well, McNaughton called Pettigill, and we were endeavoring to raise the price six percent, and Kerr Glass was not going to go along with it, and McNaughton [89] called. Pettigill was also a supplier of theirs, and told him that we were going six percent, and I ran into Pettigill at lunch. Their office was right up the street from ours, and we bumped into each other at lunch, and he told me that they were going to go three percent and retain their piece of the business.

Q. Did you report this back to Mr. McNaughton?

A. Yes.

Q. And what happened?

A. Nothing. We lost the business. I shouldn't say nothing. We lost the business.

Q. Was anyone besides McNaughton aware of your meeting with Mr. Pettigill?

A. No.

Q. Is that the only time you talked with him?

A. About business of this type, yes.

Q. And did you discuss any other account?

A. No. There was not any other account. That was the only account we had in common.

Q. Did you talk to anyone else at Corco?

A. No.

Q. Did anyone else at Weyerhaeuser talk to Corco?

A. Not that I'm aware of.

Q. Is this Downing on the list?

A. Downing, yes.

[90] Q. All right, would you tell us who you communicated with at Downing in addition to the entries in your steno notes?

A. Okay, the manager of the Rockford plant. His first name is Jim. I'm doing a great job on names for you people today. I'm sorry.

Q. (By Mr. Abrego) Downing is owned by Westerncraft?

A. Longview. It started with a B.

Q. Where is Downing located?

A. In Milwaukee, is the home office. The particular reference I'm making is to the Rockford plant.

Q. Robert Stone?

A. No.

Q. Harold Rocksy?

A. No.

Q. Jim Beech?

A. Beech. I said Beechum. Right, Jim Beech. I talked to Beech about Libby. Downing and Weyerhaeuser shared the Rochester, Minnesota business of Libby, and this is 1974, early 1974, because we negotiated for March, and we had discussions as to what was going to happen at the Libby account, and both agreed to what it was going to be.

[91] Q. (By Ms. Garrett) Who initiated those discussions?

A. I don't recall who initiated them.

Q. Were there a series?

A. A series, yes.

Q. Possibly both of you initiated them at different times?

A. Yes, it could be.

Q. And did you exchange prices during those discussions?

A. We exchanged information from where we were going to go from the present prices.

Q. And did both of you go in the same direction?

A. We both did.

Q. The same amount?

A. The same amount.

Q. Who was aware of your communications with Mr. Beech?

A. Bob McNaughton.

Q. Anyone else?

A. That's all I can think of.

Q. And did you talk with anyone else at Downing?

A. I think that based on the results of that particular quote, and the letting of the business, that Mr. Kiser called me rather upset, because they lost their [92] business at Rochester.

Q. When was this, sir?

A. This was, I think, for the '74 season.

Q. On the same March group?

A. Yes.

Q. And what was the substance of your conversation with Mr. Kiser?

A. Well, he felt that I didn't live up to my word, that I had given Jim Beech.

Q. Had you in fact given Jim Beech some sort of assurance that you wouldn't cut him?

A. Yes. I didn't cut him.

Q. You didn't cut him?

A. No.

Q. Was Mr. McNaughton also aware of Kiser's call to you?

A. Yes.

Q. And did he become involved in this exchange at all?

A. I don't recall McNaughton ever did, no.

Q. Did you discuss any other account with either Beech or Kiser?

A. With Kiser, I may have discussed the Quaker account to find out what they were going to do at Cedar Rapids.

[93] Q. Did you call him to find this out?

A. Yes.

Q. And did he tell you?

A. No, he never had the numbers at hand. They were always at the Cedar Rapids plant.

Q. Did anyone else call giving you information?

A. No.

Q. Did you ever find out what Cedar Rapids was going to do?

A. From Quaker.

Q. And when was this?

A. This was in '73, in like April of '73, somewhere in there.

Q. Were there any other clients discussed with Downing?

A. At this moment, I can't think of any others.

Q. If you think of any, be sure and let us know, please. Who have you had communications with at Green Bay?

(Off-the-record discussion.)

A. Okay, in 1974, on that conversation with Jim Beech and Karl Kiser on the Libby account, I sent one of them—and I'm not sure which one of them—a Libby price list for Rochester.

Q. (By Mr. Abrego) On what account, now?

[94] A. Libby.

Q. (By Ms. Garrett) Did you ever receive any price list?

A. I don't recall ever receiving a price list from Downing.

Q. On the other accounts and competitors you have talked about so far, or previously, do you recall any prices being exchanged?

A. No.

Q. Moving on, then, to Green Bay, who have you had communications with there?

A. Well, I don't even know whether there is any in the correct time frame from 1970. It could have been previous to 1970.

Q. Are you talking with respect to Green Bay?

A. Green Bay communications, yes. There was a man who was—he was the manager of their Green Bay plant, and I exchanged some information on Carnation with him, but I feel that this goes back out of our time frame. But there was a conversation with this fellow about Carnation.

Q. You say the Green Bay plant. Was that in Green Bay, Wisconsin?

A. Yes.

Q. And the sales manager, or general manager?

[95] A. I think he was the general manager, way back then.

Q. What happened in that account, sir? Do you recall?

A. Yes, we picked up a considerable amount of business in the account through the quote.

Q. What happened preceding the quote? Did you call this manager, or did he call you, or what happened?

A. I think he called me, and we submitted numbers, numbers being prices, and after they were in, why, Carnation is negotiated by our west coast office, and they were brought into the Carnation office, and said, "Now here is where you have to go and what you have to do,"

and they agreed to a figure that was somewhat less than the Green Bay numbers, and we got the business.

Q. Do you recall what your position was at that time?

A. I was regional sales, service manager.

Q. And at what time period were you in that position?

A. From 1967 to 1971.

Q. (By Mr. Abrego) Was his name Kott, Walter Kott?

A. Yes.

[96] Q. (By Ms. Garrett) Is that the only conversation you had with him?

A. Yes.

Q. Did you talk to anyone else at Green Bay?

A. No. (Thereupon a recess was taken.)

Q. (By Ms. Garrett) Mr. Conboy, who have you had price communications with at Hoerner-Waldorf?

A. John Jackson, at my request, sent me a price list of Midland Glass in 1973. I had conversations about Wilson & Company with George Conner over a period of years, from up to about the middle of 1974, and I had a conversation with Charles Jackson about Craftco (Metro Glass) in the end of 1973.

Q. All right, with respect to your conversations with Mr. Jackson, did you call him to request the list?

A. Yes, I did.

Q. And was that the only time you had done that with him?

A. Yes.

Q. Were you surprised to be receiving that kind of communication?

A. No.

Q. Had you ever sent him a price list for Weyerhaeuser?

[97] A. I can't think of ever having sent John Jackson a price list.

Q. Have you ever sent a price list to anyone at Hoerner? What I'm looking for, sir, is whether or not there was a standing agreement, or as a matter of course were prices being exchanged back and forth between Weyerhaeuser and Hoerner?

A. Well, I can't recall ever having—I could possibly have sent them a price list on Libby in 1973.

Q. Who would you have sent that to? Do you recall?

A. I don't recall, no.

Q. Were you in the habit of honoring prices when you received price lists?

A. Yes.

Q. Did you honor those from Mr. Jackson's list?

A. Yes.

Q. When did you have contact with George Conner?

A. It was sort of the first time I met George Conner? I met him in the customer's office, Wilson & Company. I was introduced to him by the buyer at Wilson.

Q. Was this in 1974?

A. This was even previous. 1969, or '68, somewhere in there, and from then on, why, I would see George occasionally at Wilson when I would go over there. [98] We never exchanged the actual numbers, because it was never necessary at Wilson. They would always lead you into what someone else had quoted, but we discussed what the account might need or require to make it more profitable for each of us.

Q. So you did exchange pricing information?

A. Pricing information, rather than prices, yes.

Q. And these were two-way exchanges?

A. Yes.

Q. And did you honor each other's prices, or did you at least honor his?

A. There was no recourse but to honor prices, because a customer would make you honor these prices.

In other words, if I did not honor George's prices, they would probably say to me, "Hey, you had better go back and figure your numbers, you are too low," or they might go to him and say, "You are too high," or something like that, but they led you into a common price, and there might only be $2.00 difference, and four suppliers.

Q. But hypothetically, if you were quoting the customer, any customer, less than a competitor would be quoting, wouldn't that customer be likely to take your quote at a savings?

A. Not always. To begin with, there is a lot more that goes into the supplying of a box than the price. [99] The ability to supply, whether a company has board available, and it costs the customer money to change suppliers insofar as changing dies from one supplier to another. That's worth a couple of percent, things like that.

Q. And how often did you talk to Mr. Conner over the years?

A. Oh, maybe eight times or ten times, something like that.

Q. Between 1970 and mid '74?

A. Yes.

Q. Who initiated the contact with Charles Jackson?

A. I saw Charlie and mentioned to him that we had gotten six percent at Craftco, and he said, "Oh, you lucky so and so, we only got three percent." And I said, "That's great, because next time, why, they will bring us down to your level," and that was the end of that conversation.

Q. Is that the only time you have talked prices with him?

A. The only time I can recall talking prices with him, yes.

Q. (By Mr. Abrego) How is it that you picked up the phone and called Mr. John Jackson and asked him for [100] a price list? Did you talk with him previously?

A. No. I don't know John Jackson, wouldn't know him if he walked in the room. Midland Glass was the account. Midland was sold out of the New Jersey office, and this had to do with the account, the location is in Indiana, and I got Charles Jackson, or John Jackson's prices on what he was supplying up in Shakopee, Minnesota, because I was told that the levels in Indiana were about the same as they were in Minnesota.

Q. Who told you this?

A. I think Steve Nolan told me that.

Q. Who is Steve Nolan?

A. He is Weyerhaeuser's national accounts man in New York.

Q. Had he communicated with Mr. Jackson?

A. No. If he had, I wouldn't know. He was told this by the customer.

Q. So then you called Jackson and asked him for prices?

A. Yes, right.

Q. The man had never talked to you or seen you before in his life?

A. No, I don't recall that he ever had. We may have bumped into each other and met at an FBA meeting or something like that, but I don't know the man face to [101] face.

Q. And he readily agreed to send you the prices?

A. Yes. Understand, he wasn't sending it to Jack Conboy.

Q. Who was he sending it to?

A. He was sending it to Weyerhaeuser Company. I mean me, being a representative of them—I mean I don't know that anybody calling off the street could get the prices.

Q. Do you know if there have ever been any communications between other people and Weyerhaeuser and John Jackson, and that's why he was so readily agreeable to send it to you?

A. I don't know of any other communications, no.

Q. Was this an annual account?

A. We were going in for the first time.

Q. Subsequently was it an annual account where you bid on an annual account basis?

A. Yes.

Q. Did you talk to him in '74?

A. No. We had the business then. We were then suppliers in Indiana.

Q. Did he call you for any information in '77 concerning this account?

A. No.

[102] Q. How about in '75?

A. No.

Q. Do you know if he got his information from anyone else at your organization for '75 business?

A. No, I don't think so, because he was interested in the Shakopee, Minnesota business, and I was at that time dealing only in the Indiana business.

Q. Did he suggest or did you suggest that they tie up a division of that account between Shakopee and that other place in Indiana?

A. No.

Q. (By Ms. Garrett) Did you have price communications with anyone at Hoerner besides these three men?

A. No, I don't recall that I ever did.

Q. Who have you had price communications with at Inland Corporation? Do you want to get your book out again?

A. There is a vice-president of national accounts there, or two of them.

Q. (By Mr. Abrego) Storey? Where are they located?

A. In Indianapolis.

Q. Bauer, J. E. Bauer, B-a-u-e-r?

A. No, preceding him. The communications with Inland, they ceased way back in—oh, I don't recall— [103] even in as late as 1972 there was any, except for one instance, any communications with them.

Q. McGovern?

A. Yeah.

Ms. Garrett: What is his first name?

Mr. Abrego: I think it's George McGovern, isn't it?

A. It's Don McGovern, yes. The latest communication I had with Inland was with Don McGovern, and it had to do with the Quaker business in Danville, Illinois. He asked me what we were going to do there, and I gave him the numbers, the actual formula, numbers that we were submitting for Danville. I had them in my head, because I had just finished working with them when I saw him and gave him those numbers.

Q. (By Ms. Garrett) Did he call you and ask for them?

A. He wanted them.

Q. When was this, sir?

A. That was 1974, about April of '74, for the July quote.

Q. And you had previous contacts with him?

A. I had previous contacts with Don, but I can't think of any specifics. I had a previous contact with a fellow by the name of Jack Cummins.

[104] Q. Do you recall the account?

A. The one specific account I can recall was U. S. Gypsum. We were quoting on it, and I called and asked for his numbers, which he gave to me, and after I got them and looked at them, I thought he erred, and I

called him back and said, "You forgot to give me the inner packs," and he laughed and said, "That includes inner packs," and I said, "Well, you don't have to worry about Weyerhaeuser," and I didn't even quote on the business.

Q. Do you recall the date of that exchange?

A. That has to be back as far as '71.

Q. Were there other accounts you discussed with Cummins?

A. Yes, back then he went out of this territory in about 1972, so my communications with him would be way back then. They were a supplier at Libby, and we discussed Libby. They supplied one location, Kokomo, Indiana.

Q. Did you also have telephone exchanges?

A. Yes.

Q. Did you exchange any price lists in the mail?

A. Not that I can recall.

Q. Who initiated the telephone contacts on Libby?

A. It's another one of those things that he could [105] have been calling or I could have been calling.

Q. But the purpose was to exchange prices on the account, the Libby account?

A. The one location for Libby, yes, Kokomo, Indiana.

Q. Are those the only two accounts you can recall?

A. Yes.

Q. (By Mr. Abrego) Did you talk to him on the Huffman account?

A. I'm not familiar with Huffman.

Q. Well, they make Huffy bicycles.

A. No.

Q. (By Ms. Garrett) Who besides McGovern and Cummins did you talk to at Inland?

A. Right around McGovern's name, just read a couple off. His title is not the same as McGovern's, whatever title McGovern has there.

Q. (By Mr. Abrego) He was divisional vice-president-sales, at the time you talked to him in '72.

A. Right, but he is now vice-president-national accounts, or something.

Q. Seode?

A. No.

Q. Harrison?

A. No.

[106] Q. Pete Stewart?

A. No.

Q. Turner?

A. No.

Q. Ralph Turner?

A. No.

Q. Summers?

A. Nick Summers.

Q. What did you discuss with him?

A. I honestly don't recall. My conversation with Nick goes as far back as 1971 time frame, and there was more than one conversation, but I can't recall the specific account.

Q. Were these telephone price exchanges?

A. Telephone.

Q. Two-way, or did one particular person initiate the exchange?

A. No, it was a receptacle thing. I called him when I wanted something, and he would call me.

Q. And did you exchange prices in those conversations?

A. Yes, we called on past markets.

Q. And currently anyone else at Inland with whom you have had communications?

A. No.

[107] Q. Who have you had communications with at International Paper?

A. Dennis Molahan, who was general manager of the Chicago plant. I don't recall any specifics, but there were a few accounts that we discussed and exchanged past markets, and Dave Stephens, who was sales manager.

Q. Also in Chicago?

A. At Chicago, yes. He was working under Denny Molahan at the time, and the same is true of Dave. There was more than one communication, but I cannot recall specifically the account.

Q. What time frame were these communications?

A. Well, up until about 1973.

Q. With both?

A. Yes.

Q. Were these two-way communications, or did one person make the calls?

A. Two way.

Q. And were they by telephone?

A. Telephone, yes.

Q. Did you have any meetings with either of these men?

A. Well, I had meetings with Denny after FBA meetings, stopping for a drink, and in general discussion [108] about business conditions some things came up.

Q. Did you exchange prices or exchange past markets?

A. Yes.

Q. Was anyone at Weyerhaeuser aware of your exchanging prices with International Paper?

A. At that time, Ed Grain.

Q. He was aware of the conversation with both Stephens and Molahan?

A. Yes.

Q. What was his title?

A. Ed Grain?

Q. Yes.

A. He was vice-president of the northcentral region.

Q. Did Mr. Grain have conversations with anyone at International Paper?

A. I don't believe so, and I'm not sure, but I don't think so.

Q. And can you think of anyone else at Weyerhaeuser who was having communications with International Paper?

A. No. I never got any information from anybody that they might have talked, that I can recall.

Q. And were these the only two people you talked to at International?

[109] A. Yes. I did talk to someone else. After Molahan left and went to the west coast, then Dave Stephens became the general manager of the plant, and the man that was appointed sales manager, we met at the Chicago Athletic Club, and he wanted to talk about Wilson & Company, and what International Paper wanted to do in that account as far as raising its percentage they wanted, and at the time I listened to him, and we turned him down flat and said we would not go along.

Q. Was this a prearranged meeting at the Athletic Club?

A. Yes.

Q. At whose instigation?

A. His.

Q. Do you recall his name?

Mr. Abrego: Fowler?

A. That name doesn't ring a bell, but I only met this man once, and he was only on the scene a very short time.

Q. (By Ms. Garrett) Can you pinpoint the time for us? Earlier you stated that you talked with Molahan and Stephens up to 1973.

A. I don't know.

Mr. Abrego: He was only there a year, less than a year. He was there six months, [110] from 11-72 to 6-73.

A. When did Molahan leave there? That's one way to tell.

Mr. Abrego: Molahan was plant manager '64 through '71.

A. Okay, then that could be the man, then, because Stephens took over after '71.

Mr. Abrego: Yeah, Stephens became plant manager '71 through '76.

Q. (By Ms. Garrett) Do you recall anyone at International Paper?

A. No.

Q. Who have you had pricing communications with at Mead?

A. I don't know whether this falls in the correct time frame, but I had conversations with a man by the name of Norris Dunning, and it may have preceded the 1970 that you talked about. I'm not certain, but it goes back a long time.

Q. What was his title?

A. He was president of Mead.

Q. What accounts did you discuss with him?

A. I think it was General Electric in Louisville.

Q. Can you give us the circumstances of your talking with a corporation president on an account?

[111] A. Repeat the question, please.

Q. How is it that you happened to be talking to the president of the company on an account?

A. I met Norris at FBA meetings, and we became friendly, seemed to get along fine, and he was the only one I knew there.

Q. Did you have the impression that he was actually involved in pricing accounts for his company?

A. Well, I don't think he actually set the prices. I wouldn't think he would, any how. I don't know, but he certainly had access to them, in the group that I wanted.

Q. Were you requesting information from him?

A. Yes.

Q. Was he requesting any of you?

A. In think we were exchanging information on boxes that each one of us had.

Q. Did any lower level of employee of Mead ever contact you after your discussions with Dunning?

A. No.

Q. He was your only contact the entire time?

A. He was the only contact. I can't think of anybody else I would ever talk to at Mead.

Q. And did you honor the prices that you received from him?

[112] A. Yes.

(Off-the-record discussion.)

A. Okay, I remember calling a fellow by the name of John Zinke at Mead, and he told me he wasn't allowed to talk.

Q. (By Ms. Garrett) What was his position?

A. He was the marketing manager, corporate marketing manager.

Q. Do you recall when you telephoned him?

A. Oh, about 1973, after Norris left.

Q. And what account were you seeking information on?

A. I don't recall.

Q. And did he tell you why he couldn't talk or wouldn't talk?

A. No. There was really no reason to tell why. You just said, "We are not on the phone," and everybody knew what that meant.

Q. (By Mr. Abrego) When was that, now?

A. About 1973.

Q. Was he at that time general manager of national accounts?

A. Yes.

Q. Zinke?

A. Zinke.

[113] Q. (By Ms. Garrett) Who did you have price communications with at Owens Illinois?

A. Here we go again. A fellow who was sales manager of the Chicago plant. Clarence Perry.

Q. And the account discussed?

A. Libby.

Q. What kind of exchange was it, telephone, or by mail?

A. Telephone.

Q. And who initiated the conversation?

A. I think he initiated the first, but I probably returned his call.

Q. How many have you had with him?

A. Okay, I'm just trying to get a date. Okay, this was in about April of 1974 we were negotiating the Libby contract. They were a supplier at Sunnyvale, California, as were we. We both were aware of each other's numbers that went in originally. I was being made to meet a lower number than he told me had been accepted for OI, and I called him back and said, "Are you sure that they have accepted your numbers?" And he said, "Yes, I have been given my business." We each went in with numbers very similar originally, but I was forced to go lower, which I didn't do, and I lost the business.

[114] Q. Who was forcing you to go lower?

A. Libby. I was being forced to meet a Fiberboard price. That's going back to that conversation with Blaine Murray, again, in '75, when we were coming back into the account. We had been wiped out of it.

Q. Is that the only account you discussed with Mr. Perry?

A. It's the only account I can recall, yes.

Q. And did you talk to anyone else at Owens Illinois?

A. Yes.

Q. Anyone else at Weyerhaeuser talk to Owens Illinois?

A. Not that I'm aware of.

Q. Who have you talked with at Packaging Corporation of America?

A. Well, the conversations that we had, we talked about, was Bob Haynes, and the Quaker deal is the one that I'm making reference to on that one.

Q. Would you briefly go over that for us, the Haynes conversation?

A. Well, the same Haynes conversation, the one we discussed before, about Quaker, when Haynes said that there had been an agreement that everybody was going to be fifteen percent on Quaker, and I only went [115] something less than the fifteen percent, and that's when Haynes called either Jack Wecter or Win Wilson and said I wasn't living up to what they had agreed to in New York, and they got back, either Wecter—it was Wilson, I'm pretty certain, got back to Bob McNaughton, and McNaughton explained the circumstances.

Q. That was the 1975 occurrence?

A. No, that was in 1974.

Q. Is that the only one you had with Mr. Haynes? Is that the only pricing communication between Weyerhaeuser and PCA?

A. It's the only pricing communication that I had, and if there were any others, I'm not aware of them.

Q. (By Mr. Abrego) Going back to OI, did you ever talk to Dave Marshall, national account sales manager?

A. No, Dave Marshall was—he was here for a very short time in about 1967 or '68, something like that, and then he was transferred to the east, and took over two of their plants back there, I think, in Burlington, New Jersey, or something like that.

Q. Who have you had pricing communications with at St. Joe Paper Company?

A. There was a fellow by the name of Kelly. That was out of—he formerly worked in Chicago, and then I [116] think he went to Cincinnati as a sales manager, and I can't remember the name of the account, but it was a school supply business, as I recall, and they were quoting on the business, and we were quoting on it, and I sent him our prices.

Q. By mail?

A. Yes.

Q. Did he ask for them?

A. I think he did.

Q. Did you talk to him when he was in Chicago, or in Cincinnati?

A. When he was in Cincinnati.

Q. Was his name Richard Kelly?

A. No, I think it was Dick. He came from McKees-Ross, I think. He came from the east somewhere, and he came to Chicago, and then he went to Cincinnati.

Q. They don't have a Cincinnati plant.

A. Well, Louisville.

Q. Kelly, you say?

A. Yes, I'm pretty sure that was his name. It has been a long time.

Q. (By Ms. Garrett) Can you approximate the date of the exchange with Mr. Kelly?

A. It was in 1972 or 1973.

Q. Was that the only time?

[117] A. Yes.

Q. Is he the only person you talked to at St. Joe?

A. The only other person I would have talked with at St. Joe would have been Dave Hardman, and I don't recall whether I did or not, to tell you the truth, but he would have been the only other one that I would have had a conversation with, and I can't recall that I did, so I can't recall any account.

Q. Why it is possible you would have talked to him?

A. He's the only other one I know.

Q. Why is it likely you would have talked to him? Was anyone aware at Weyerhaeuser of you sending the price list to Kelly?

A. Yes, Bob McNaughton.

Q. Did you ever get his approval before mailing it out?

A. Well, I didn't have to get his approval, no.

Q. Did he become aware of this before, or after you sent out the price list?

A. I don't recall, because I had to get the price list from our Mount Vernon plant. I asked for the price list from Al Smith at Mount Vernon.

Q. Is Al Smith the manager there?

A. Sales manager.

[118] Q. Who have you had price communications with at St. Regis?

A. Bud Smith. I don't know his first name.

Q. What was his title?

A. He was national account sales manager.

Q. When did you talk to him?

A. Well, I saw him frequently, because his offices are in the same building as ours, but it was not always a discussion of business. It was frequently over drinks and things like that, but we did discuss business, specific accounts, being Quaker, Wilson, and those are the only two I can think of right now.

Q. Were there others?

A. There could have been.

Q. When do you recall talking to him on prices?

A. Well, I was seeing the man from like 1967 until he left in '74, so it would be in that period.

Q. And in addition to seeing him, did you telephone him or send him price lists in the mail?

A. I never sent him a price list in the mail.

Q. Did you talk to him on the phone?

A. I talked to him on the phone.

Q. And you assumed that over the years you had receptacle price exchanges?

A. Yes.

[119] Q. And did you honor each other's prices?

A. Yes.

Q. Was anyone aware of your long-standing price exchange with Mr. Smith?

A. Well, I know that Ed Grain was certainly aware of it, as was Bob McNaughton.

Q. Did they ever communicate with Mr. Smith?

A. Ed Grain being in the same building, there is a possibility of running into each other in a restaurant or something like that. It's entirely possible, but I was not present when the conversation transpired between the two people.

Q. And are you aware of anyone else at Weyerhaeuser talking to anyone at St. Regis?

A. No, I'm not.

Q. Okay, did you talk to anyone else at St. Regis?

A. No.

Q. Who have you had pricing communications with at Stone Container?

A. They had a customer service or sales service manager there in the Chicago office.

Q. When was that?

A. Through about 1972, and if I wanted anything, I would call him, and if he wanted anything he would call me.

[120] Q. And did you in fact call each other to exchange prices?

A. Yes.

Q. Do you recall on which account?

A. No.

Q. (By Mr. Abrego) Is that Kenneth Hardwetz?

A. No.

Q. Gordon Ross?

A. No. It was a fellow that was not up that high. He was a customer service man.

(Off-the-record discussion.)

Q. (By Mr. Abrego) Could you give me dates again of your conversations with this customer service manager in Chicago?

A. From 1967 through about 1971 when I left Chicago.

Q. And is he the only person you talked to at Stone?

A. Yes. Marty Bowman, way back in the late '60's, maybe as late as 1970. I don't know. He would call and ask for past markets on specific accounts.

Q. And were these the only two people?

A. The only two that I can recall.

Q. Did anybody else at Weyerhaeuser talk to Stone on prices?

[121] A. The only time that I have an awareness that someone talked was I received from our people in the Detroit plant a list of prices that Stone was charging Frito-Lay, and this goes back to about 1973, but who it was in our Detroit plant that talked to Stone and got the prices, I don't know, and I don't know to whom they spoke. I received the prices from our sales manager, Doug Allen. Whether he was the one who got them or not, I don't know.

Q. And Doug Allen was the sales manager in Detroit?

A. Our Detroit plant, yes.

Q. Who did you have price communications with at Union Camp?

A. A long time ago I spoke to a fellow by the name of Roy Caponi.

Q. How long ago?

A. Oh, gee whiz, it has to be in 1971, because he left them a long time ago, and went to Bell Fiber.

Q. Did you talk to him when he was at Bell Fiber?

A. No.

Q. And what accounts did you discuss with him while he was at Union Camp?

A. One of the accounts I discussed with him was General Electric in Rockford, and I know I spoke [122] to him about other accounts, but that is the one specific one that I can recall.

Q. Who initiated that conversation about General Electric?

A. I did, to give him our market.

Q. Okay, had he requested them?

A. I don't recall whether he requested them or not.

Q. Do you know if he honored them once he got them?

A. He did not.

Q. Did something else happen as a result of his not honoring them?

A. We lost the business.

Q. Did anyone else at Weyerhaeuser know of your conversation with Caponi?

A. Ed Grain.

Q. Anyone else?

A. I can't think of who else.

Q. Do you know if Mr. Grain took some action as a result of Caponi not honoring them?

A. No.

Q. Do you know if Mr. Grain talked to anyone else at Union Camp about this?

A. I know that he was going to try and get in [123] touch with Joe Neil.

Q. Who is he?

A. He was the head of Union Camp's shipping container division.

Q. Why did he plan to get in touch with Mr. Neil?

A. Because his prices were cut.

Q. He was complaining, in other words, about the G.E. account?

A. Yes.

Q. Okay.

A. Whether he ever succeeded or not, I don't know. We have never supplied another box to that location, and I don't know whether Union Camp is presently a supplier.

Q. Are you aware of anyone at Weyerhaeuser ever talking to Union Camp on any other account?

A. No. I can't at this moment recall anybody.

Q. Who have you had pricing communications with at Westerncraft?

A. Why when I'm asked do I draw a complete blank? Bob Prentiss.

Q. When was this?

A. This was in the period like from 1967 to '72 or '73.

Q. And do you recall the account that you discussed? [124] A. No. I can't recall any accounts, but there was more than one conversation about various accounts.

Q. (By Mr. Abrego) How about Campbell Soup?

A. No. I may have talked to Prentiss about Campbell Soup. Our interest in Campbell Soup was never very high. That's why I hesitate to talk about that in Chicago.

We had not been a supplier there for as long as I have been with the division.

Q. (By Ms. Garrett) Are you speaking of conversations you had with him?

A. Yes.

Q. Were these frequent?

A. Frequent being like once every four to six months, something like that.

Q. And were they telephone conversations?

A. Yes.

Q. Who was initiating the conversations?

A. Both of us.

Q. And were they for the purpose of exchanging prices?

A. Yes.

Q. Did you honor each other's prices?

A. I think he did. I always did.

Q. Was he the only person, other person you talked to at Westerncraft?

[125] A. Well, Chuck Joyce called me one time, as we spoke of before, and I told him that I couldn't talk to him.

Q. That was since 1975?

A. Yes. Bill Lawson, he was a sales manager at Westerncraft, at one of their plants. I can't remember which one it was. Then he became a national accounts man, and now he is a sales manager.

Q. When did you talk to Mr. Lawson?

A. In the period of '68, '69 and '70.

Q. Do you recall the accounts you discussed?

A. No, I don't.

Q. Were they telephone conversations?

A. Yes.

Q. Were they frequent?

A. Not as frequent, perhaps, as those with Bob Prentiss, I might have talked to Bill Lawson maybe four times over a period of years.

Q. Was anyone aware of your conversations with Mr. Lawson?

A. Yes, Ed Grain.

Q. Did he become involved at all in these exchanges with Lawson?

A. Only to the extent that I was told to call and get the information.

[126] Q. Grain told you to call?

A. Yes.

Q. Was this the usual circumstance, or did Grain tell you to call only in a few instances?

A. No, I was told to call, and in just about every instance I was told to get someone's past markets.

Q. And did Mr. Grain also know about your conversation with Mr. Joyce?

A. No. Mr. Grain wasn't with the company then, and when Mr. Grain was at our company, Mr. Joyce was also with the company.

Q. (By Mr. Abrego) Where is Ed Grain now?

A. I don't know. He was with Candle Lees, but I was told a couple of weeks ago that he left there.

Q. Was with who?

A. Candle Lees.

Q. (By Ms. Garrett) Anyone else at Weyerhaeuser that knew about the conversation with Chuck Joyce, or the one conversation in '75?

A. I don't know. I may have mentioned it, but it was so matter of fact, our status at that time, that I wouldn't make a point of telling anybody. If I did, it would just be to say, "Hey, Chuck called, and he's married again for the fourth time. We hope that he does a little better on this one than he did on the ones in [127] the past," and that's all.

Q. (By Mr. Abrego) Did you ever talk to Ward Black?

A. No.

Q. Do you know him?

A. I know him. I met him, and I have seen him a couple of times. He is regional manager of Westerncraft.

Q. Regional manager?

A. Yes.

Q. (By Ms. Garrett) Anyone else at Weyerhaeuser that knew about your conversations with Prentiss?

A. No. See, there would be no reason to know. It was strictly within the region. As long as Grain was the man, he was the hauncho, and if anybody above him knew it, why, I'm not aware of it, or what he did with the information once I got it.

Q. Did Grain know about Prentiss?

A. Oh, yes.

Q. Did you talk to anyone else at Westerncraft about prices?

A. I don't recall anyone else.

Q. Anyone else at Weyerhaeuser talked to Westerncraft about prices?

A. I don't know.

[128] Q. Who have you had pricing communications with at West Vaco?

A. This goes back so long—

Q. 1970 and forward?

A. It could be 1970, but a great big fellow, dark hair. He is still at West Vaco in Chicago, I think.

Q. Do you recall his title?

A. General manager, in the West Vaco plant.

Q. And what account did you discuss with him?

A. I don't recall.

Q. (By Mr. Abrego) Walter Udell?

A. Walter Udell.

Q. (By Ms. Garrett) Does that bring to mind the account?

A. No. West Vaco, I can't recall what it was.

Q. What time period would these be?

A. This goes back to like 1970 or '71, and with Walter Udell there were perhaps two, but not more than two conversations.

Q. Were these price exchanges?

A. Pricing information.

Q. I mean exchanges of pricing information?

A. Yes, as differentiating from exchanging an actual price, meaning what we are going to do, you know.

[129] Q. The inference was on the exchange?

A. Right.

Q. And did you honor prices you received from him, pricing information you received from him?

A. I believe in this case that I was the instigator of the telephone call, and he would have honored what I told him.

Q. Had he requested your prices?

A. No. It was an account we were sharing.

Q. Is it your recollection there was only one account you discussed with Udell?

A. There was only one, or at most two phone calls I had with Walter Udell.

Q. But on one account?

A. As far as I can recall, yes.

Q. Did you talk to anyone else at West Vaco?

A. No.

Q. Anyone else at Weyerhaeuser talk with West Vaco on prices?

A. I doubt it very much. I'm not aware of it, if they did.

Q. Who did you have pricing communications with at Olincraft?

A. I don't recall. He's in Detroit now, I think, or someplace up there.

[130] Q. (By Mr. Abrego) What was his position?

A. He is a general manager now. I think he was sales manager then.

Q. In Cincinnati? Adams?

A. Right. There is two Adams.

Q. This one is L. Adams.

A. Was he in Cincinnati?

Q. He was in Cincinnati. He was sales manager from '70 to '72.

A. No, there is another one, I think, Lee Adams. There are two Adams there, and '70 to '72, that would be about right, yes, Lee Adams.

Q. Lee Adams?

A. Yeah, and the account was Ross Labs in Columbus, Ohio.

Q. (By Ms. Garrett) Was that a telephone exchange?

A. Yes.

Q. Do you recall who initiated it?

A. Well, I think he called first, but I know that I returned calls to him.

Q. Did you have several conversations about this account?

A. Yes.

Q. Approximately how many?

A. Oh, I would say maybe three or four.

[131] Q. Over the two-year period?

A. No, at one given time, for like the 1972 business, or something. It was only this one quote. It wasn't over a period of time.

Q. And did you exchange price information?

A. Yes.

Q. Did you honor the prices?

A. Yes.

Q. Is Mr. Adams the only person you talked to at Olincraft?

A. Yes.

Q. Can you think of any other account you might have discussed with him?

A. No. There weren't too many that we shared. There was another Adams out of Chicago with Olincraft too.

Q. Did you have conversations with him about prices?

A. Yes, but this is so far, so long ago, I don't think it is in the 1970 period.

Q. Would it predate 1970?

A. I think so.

Q. Who was aware of your conversations with Lee Adams?

A. Bob McNaughton.

[132] Q. Did he become involved at all in the exchanges?

A. I don't think he had direct contact with Lee.

Q. To your knowledge did he talk with anyone at Olincraft about prices?

A. No, to my knowledge, he didn't.

Q. To your knowledge did anyone else at Weyerhaeuser talk with Olincraft on prices?

A. I can't say with any certainty that anybody did.

Q. Who did you have price communications with at Southwest Forest Industries?

A. The fellow's name was Sheppard.

Q. And his position?

A. He is now general manager.

Q. Where?

A. In the Chicago plant.

Q. What account did you discuss with Mr. Sheppard?

A. It was Sherwin-Williams.

Q. Do you recall when this discussion took place?
A. In about 1973.
Q. And was this a telephone conversation?
A. Yes.
Q. Who initiated it?
A. I did.
Q. Did you call him for pricing information?
[133] A. No, I called to tell him that we had gotten the price from the customer, and he was very low.
Q. He had cut your price?
A. Well, he was a current supplier, but he was in there, and we were going to have to move down to his level.
Q. And did you change your prices?
A. We had to change our prices.
Q. Did you keep the account?
A. Yes.
Q. Had you received instructions to call Sheppard about the lower prices?
A. Yes.
Q. From whom?
A. From McNaughton.
Q. Did anyone else at your plant know about this?
A. I think Al Smith was aware. Al Smith was the one who brought the discrepancy in pricing to our attention.
Q. Who is Al Smith?
A. Al Smith is the sales manager at Mount Vernon. Sherwin-Williams is sold out of Cleveland, Ohio.
Q. Did anyone else at Weyerhaeuser talk to Southwest Forest about prices?
[134] A. Not to my knowledge.
Q. Was this the only account you discussed with Mr. Sheppard?
A. Yes.

Q. And is he the only person you talked to at Southwest?

A. Yes.

Q. Who have you exchanged prices with at Minasha?

A. Tad Sheppard.

Q. What is his position?

A. He is president, I think, of Minasha now.

Q. Was he at the time you were having communications with him?

A. No, at the time he was the manager of their corrugated division.

Q. When was this?

A. This was in 1970 or '71.

Q. What account was discussed?

A. I don't recall the account that we may have discussed.

Q. Were these telephone exchanges?

A. Yes.

Q. Price information exchanges?

A. Now, the specific one that I'm trying to think [135] of, Minasha had cut our price, and I was after Tad to move the price up.

Q. Did you call him?

A. Yes.

Q. Did he change his prices?

A. No.

Q. Was there any further action taken because he didn't change his prices?

A. In all probability, we had to lower ours.

Q. Do you recall discussing this with one of your superiors?

A. Yes, Bob McNaughton.

Q. And did McNaughton become involved in the exchange at all?

A. He said at the time that he was going to call Tad. Whether he ever did or not, I don't know.

Q. Anyone else become involved in this incident?

A. No.

Q. Did anyone else become aware of it?

A. Whatever plant it was, and since I can't recall the account, I can't recall the plant, but whatever plant it was that manager, or sales manager would have been aware that there was some effort being made to have Minasha change their price, but I can't think of the account. It's like I can't think of the plant.

[136] Q. All right, was Mr. Sheppard the only person you talked to at Minasha?

A. He is the only one I knew, yes.

Q. Did anyone else at Weyerhaeuser talk to Minasha about prices?

A. I don't know whether they have or not.

Q. Who did you exchange prices with at Hankins, or McMillan-Bloedell?

A. He was in Cleveland. He was a vice-president of Hankins before the McMillan-Bloedell merger.

Q. (By Mr. Abrego) Is he still with them now?

A. I don't know.

Q. (By Ms. Garrett) Do you recall when you talked to this person?

A. In about 1971.

Q. And about which account?

A. Cleaners Hangers.

Q. Okay, what were the circumstances there?

A. We supposedly had cut his price.

Q. And he called you to verify the cut?

A. Yes, and I returned his call when I got the information from our people.

Q. Had you in fact cut Hankins' prices?

A. No.

Q. And did he accept that explanation when you [137] told him?

A. I don't know. In a case like that, you just said what you had to say, and terminate the conversation. You know, otherwise, it would lead you to a you-did-this and you-did-that sort of thing, and I didn't care to be involved in that sort of thing.

Q. Did you have any subsequent contact with this person?

A. No.

Q. And who was aware of this exchange?

A. Bob McNaughton.

Q. (By Mr. Abrego) Was it Robatski?

A. No.

Q. Robatski was president from '72 to '74.

A. It was prior to that. He was in Cleveland.

Q. (By Ms. Garrett) A vice-president, or president?

A. He was vice-president.

Q. Did Mr. McNaughton become involved in this?

A. I don't think he did.

Q. Did anyone else at your company become involved?

A. No.

Q. Did anyone else at Weyerhaeuser talk to McMillan-Bloedell?

A. About this, no.

[138] Q. About anything, before or after the merger?

A. No, not that I'm aware of.

Q. Did you talk with anyone at McMillan after the merger?

A. No. The only conversation I had with McMillan-Bloedell was in an effort to buy some wax impregnated medium from them.

Q. (By Mr. Abrego) Did you ever talk to Pete Friberg?

A. Pete Friberg was the manager, the name you are looking for.

Q. (By Ms. Garrett) While he was with Hankins?

A. Yes.

Q. And you have no recollection of anyone else at Weyerhaeuser talking to Mr. Friberg?

A. No, I do not.

Q. Who have you had pricing communications with at Wabash Fiber?

A. Bill Saxelby.

Q. When was this?

A. Terminated in 1974.

Q. What accounts were involved?

A. The Campbell Soup account was involved, and he was interested in the Chicago business. I was interested in the Ohio business. And there is one size. [139] The soup can is called 48 No. 1. In other words, it's No. 1 can, and forty-eight of them go into the box, and that is the basis for all their pricing. Whatever you price the No. 1 can at, the rest of the prices stem from that, based on the price per square feet, and he called and used to give me the dope on what was happening at the Campbell Soup account. I never used the information in any way, because we were never a factor and never wanted to be a factor in Chicago, but we supplied over Ohio, and I also had a conversation with him going back to about 1971 or '72 on a company called Miles Lab.

Q. Was this a telephone conversation?

A. Yes.

Q. Initiated by whom?

A. Saxelby.

Q. Were you sharing that account?

A. At that time we were.

Q. And were you exchanging price information?

A. Yes.

Q. Who have you had price communications with at Potlash Industries?

A. I don't recall ever talking to anybody at Potlash.

Q. All right, I think we might have been off the record at the time, but you did indicate that perhaps [140] Potlash had been on the competitors you had talked to, is that correct?

Mr. Coffield: I wrote it down because he had a question about it, and he couldn't think of it.

Mr. Abrego: They were merged with Westerncraft in '74.

A. Yeah, it goes back to '74 before I came back to Chicago.

Q. (By Ms. Garrett) Would you have covered your explanation with anybody at Potlash under your communications with—

A. No, I would have considered them two separate companies. No, Potlash was never a factor in our market.

Q. All right, so we have covered the entire list of competitors as written down by your counsel, presumably, within your knowledge, as to the companies you have had communications with. Can you think of any others that we might have left out?

A. No. Going over the list, it was—

Mr. Coffield: Why don't we take a break and let us review them. We have some notes that may or may not reflect information, and we can assist Mr. Conboy with it.

[141] (Thereupon a recess was taken.)

Q. (By Mr. Abrego) Okay, back on the record, there are no other companies that you recall having communications with, Mr. Conboy?

A. No, there are not.

Q. Okay, now we are going into the last phase, just some questions we have got to ask you. When did you become aware of your company policy concerning price communications with competitors?

A. The company, the very first information I had, I was instructed that I was not allowed to ask for a competitor's price, that I was allowed to ask and legally, or I was led to believe, at least, that I was allowed to ask for past markets, and that was the ground under which we proceeded. Sometime in—it has to be like in late '71 or early '72, there was a letter came out from Jack Wecter in Tacoma to everybody that telephone communications or personal meetings with competitors to discuss any pricing activity was strictly forbidden by the company.

Q. Did he tell you why it was forbidden?

A. There was an attachment from Francis Carrigan, that after the Greensboro case, that outlined the legal aspects of the thing.

Q. So at that time you knew that it was illegal?

[142] A. Yes.

Q. For antitrust reasons? Your answer was yes.

A. Yes.

Q. Okay, have you ever been told by your superiors that you must communicate with competitors in order to comply with the Robinson-Patman Act?

A. No.

Q. Do you sell boxes to the federal government?

A. I personally do not. The company may. I'm not aware of whether they do or not. We quote on boxes to the federal government.

Q. Have there been communications with competitors on these quotations, that you know of?

A. Positively, I know not.

Q. Other than with attorneys, have you discussed your testimony with us here today with anyone else?

A. No.

Q. Has anybody suggested what you should or should not say or disclose?

A. No.

Q. Has anybody intimated that to you?

A. Not at all.

Q. Okay, Mr. Conboy, we have now completed several hours of questioning. Is there anything that we have failed to ask you, or failed to touch upon that [143] you consider important and want to have on the record?

(Off-the-record discussion.)

A. No, the only thing I would like to add is that my recollection of my activities from the beginning of 1975 through the present are pinpointed so well because of a personal problem in my own life, and I never went back to Worthington after December of '74, so that's why I know that I can pinpoint when the call from Win Wilson came telling me it was in risk of losing my job if I did have any communications, and naturally I ceased immediately.

Q. (By Mr. Abrego) Why is it that you have these notebooks from '75 on and not before?

A. Well, I had them before. I started this when I was the regional customer service manager. I averaged sixty to eighty phone calls a day, and I could not retain the information, because I was dealing with many different problems, different in nature, different in everything else, at the same time, and I, like everybody else, made notes on a legal pad, and it didn't suffice, so I began to write things down, and my first job when I would go in in the morning would be to review my previous day's phone calls. As the book would become full, I would just throw it in the bottom drawer of my desk, in case I had to refer to it. When I moved, my [144] office was moved from Chicago to Worthington, Ohio in 1971, in the middle of '71, and it was just a clean-out factor so that we didn't move a lot of junk down with us, and everything that had transpired before that, I had saved it, or I know I had saved a lot of it, and a lot of it that had been

there was just thrown away. From '71 until '75 the nature of my job had changed so that I wasn't on the phone constantly like I had been in the past, and then when I came back up here, or back to Chicago in 1975, why, once again, I started having a lot of telephone conversations with our people in the various plants about pricing, because I did a lot of the work on accounts other than those for which I am directly responsible.

Mr. Abrego: Okay, thank you, sir.

Mr. Coffield: I just want to make one statement for the record, and that is to request, as was at least the case in the earlier interviews, that Mr. Conboy have an opportunity to review the transcript of his interview, and make any corrections that may be necessary, or be able to add anything, if anything occurs to him later, which we could do by affidavit, or if something occurs in the interim between the time that we are done [145] today and the time the thing is typed up.

Mr. Abrego: All right. That will be it, thank you.

[146] (Certificate of the Clerk of the Grand Jury omitted in printing.)

Conboy X2 ID—5/20/81

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS

GRAND JURY TESTIMONY OF
JOHN A. CONBOY

Appearances:

Mr. J. Albert Kroemer
Ms. Constance Garrett
Mr. Russell Abrego
Anti-trust Division
United States Department of Justice
Suite 86C, 1100 Commerce Street
Dallas, Texas 75242

Interrogators

Be It Remembered, that on the 18th day of January, 1977, at a hearing before a Grand Jury in the City of Houston, Harris County, Texas, the following testimony was adduced from the aforesaid witness, and the following proceedings were had, [2] to-wit:

JOHN A. CONBOY, the witness hereinbefore named, being first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Examination by Mr. Kroemer.

Q. Would you please state your full name for the record?

A. John Anthony Conboy.

Q. Mr. Conboy, we have previously been informed by your attorney, Mr. Novak, that it was your intention to invoke your Fifth Amendment privilege before this grand jury and refuse to answer questions which were put to you which might incriminate you with respect to anti-trust violations in the corrugated container industry. Based upon Mr. Novak's representations, we have petitioned to the district court for this district for an order compelling your testimony before the grand jury and granting you immunity from the use of the information which you give the grand jury. At this point I'm going to ask the foreman if he will communicate that order to you.

The Foreman: All right, this is Grand Jury 76-3 Order. "Upon the application of the United States Attorney [3] for the Southern District of Texas for an order to require testimony of a witness before the Grand Jury, pursuant to the Organized Crime Control Act of 1970, 18 U. S. Code, Section 6001 and subsequent, and it being represented by the government that the deputy assistant attorney general of the United States, Hugh P. Morrison, Jr. has approved this application, it being the judgment of the United States Attorney and the deputy assistant attorney general that the testimony of John A. Conboy may be necessary to the public interest, and that such individual is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, therefore, it is hereby ordered that in accordance with the Organized Crime Control Act of 1970, 18 U. S. Code, Section 6001 and subsequent, John A. Conboy give testimony or provide other information before the grand jury, and that any testimony given by John A. Conboy pursuant to this order shall be subject to the immunity [4] provisions of the Organized Crime Control Act of 1970, as provided in 18 U. S. Code, Section 6002."

It's signed "Woodrow Seals, United States District Judge."

Q. (By Mr. Kroemer) Okay, Mr. Conboy, pursuant to the order which has just been communicated to you by the foreman, you may not refuse to answer questions which are put to you by the grand jury. Do you understand that?

A. I do.

Q. However, none of the information which you give to the grand jury, nor anything derived from the information you give to the grand jury, can be used against you in a subsequent proceeding. Do you understand that?

A. Yes.

Q. (By Ms. Garrett) Good morning, Mr. Conboy.

A. Good morning, Connie.

Q. Sir, you appeared in our Dallas office on January 10th of this year?

A. Yes, I did.

Q. Is that correct?

A. Yes.

Q. And you were represented by counsel at [5] that time, is that correct?

A. Yes, I was.

Q. Present at that interview was myself, you and your attorneys, and Mr. Abrego, is that correct?

A. That's correct.

Q. Prior to that interview date your attorneys submitted to our office seven stenopads in which you kept records of conversations you had with employees and competitors in the corrugated industry, is that correct?

A. That's correct.

Q. Sir, I have before me the seven pads. Would you please identify these and let us know if these are in fact the documents which your attorneys submitted to us?

A. These are those documents, yes.

Q. And the dates on those documents range from July 8, 1975, through October 3, 1977, is that correct?

A. That's correct.

Ms. Garrett: I would like to have these entered in as Grand Jury Exhibits, Conboy 1 through 7.

Q. (By Ms. Garrett) On the interview of January 10th, did we not go through these stenopads [6] page by page to list the conversations you had that concerned competitors in the industry?

A. We did.

Q. Sir, I'm going to go over some of that information, and if you could recall that, you might want to verify that with the books as we go through it.

A. Yes.

Q. They should be in order, 1 throught 7.

A. Thank you.

Q. With respect to Page C003, which our office numbered consecutively, did you not relate to us a conversation which you had on 7-14-1975?

A. Yes, I did.

Q. And could you tell this grand jury the substance of that conversation, and who was involved?

A. This is the conversation that I had with one Belle Hansen, who was secretary to Winfield Wilson, manager of national accounts for Weyerhaeuser Company, and the substance of it was, in the book here it says "Gave three items at Rockford, Weyerhaeuser vs. Downing."

Quaker Oats had put their business out for quote in about April to many people. We had all quoted. At the time Weyerhaeuser and Downing were [7] sharing the business at the Rockford plant of Quaker Oats. We all submitted prices.

The outcome of it was that Weyerhaeuser became or got a greater share of the business than they previously

had, and Downing lost their business. Downing accused Weyerhaeuser of having cut the price.

The business the previous year, and in all years with Quaker, you can pretty much tell what your competition is charging, because they are not going to pay—Quaker, that is—are not going to pay the competition any more than they are paying you for your boxes, so subsequent—or previous to 1975, we were probably both at about the same level of cost to Quaker.

When the business was let for 1975, Quaker goes on a fiscal year of July 1st to June 30th of the succeeding year. We succeeded in getting a lot more business than Downing, so Downing assumed, then, that we cut their price, from our 1974 price, in order to get this additional business.

I was asked if that was so by my management, and this conversation here gave three items. There was three items that I gave to our people in Tacoma showing that in actuality I did not cut Downing's price.

[8] Q. So on the 14th, sir, you gave this information to Belle Hansen, who presumably related it to Mr. Wilson?

A. Yes.

Q. And did you subsequently write a letter to Mr. Wilson restating all this?

A. Yes, I did. It gave the three items with their cost in 1974, what I assumed were Downing's costs of 1974, and what our cost in 1975 as against Downing's costs for 1975.

Q. Prior to this, Karl Kiser with Downing, one of your competitors, had talked to your boss, Mr. Wilson, is that correct?

A. That's correct.

Q. And this did occur in 1975?

A. Yes, it did, some time previous to July 14th.

Q. Sir, with respect to your entry on Page C017, Items Reference 9 and 10—it should be in the first book.

A. No, I think that's in the second, for January 5th.

Q. What year?

A. 1976.

Q. What is the reference you have there?

[9] A. I don't see a 9 or 10. What was the date, or the page number, again?

Q. 17.

A. Oh, 17?

Q. Right.

A. I'm sorry, I thought it was 117.

Q. We'll try to go chronologically.

A. Yeah.

Q. What is the date on your notes, sir?

A. The date of my note would be July 18, 1975. I presume you are referring to Number 9, conversation with Bob Savage.

Q. Correct. Would you summarize that briefly for the grand jury, please?

A. Okay, the note here says, "IP knows of our deal with Wilson"—Wilson being Wilson & Company, the meat company.

Q. And IP is—

A. IP is International Paper. We had reduced Wilson's price six percent, and immediately upon reducing it, a wire went out from the Oklahoma City office of Wilson & Company to all the Wilson plants, telling them that Weyerhaeuser had lowered their prices six percent, and to use that as a factor in ordering more boxes from Weyerhaeuser, and we would, naturally, [10] endeavor to keep something like that a secret, but IP learned of it through a Wilson local plant buyer. Who it was, I don't know, but IP evidently—somehow Mr. Savage knew, found out that IP knew of our six percent deal with Wilson.

Q. So you are saying that you have no idea who Mr. Savage received this information from?

A. Well, in all probability he got it from one of our salesmen going into Wilson's plant. He must have learned of it that way. And then it was communicated to Savage. That's the only way I can think of. I have no other way of knowing.

Q. You were not involved in that exchange?

A. No.

Q. Referring to Item No. 6 on Page C061, would you summarize that for us, please?

A. This is October 7, 1975, Item 6. It's a conversation with R. Savage, Bob Savage. He was the regional manager for Weyerhaeuser at that time. And the first part of the conversation had to do with a cost study that I was requesting on the cost of producing boxes at Cedar Rapids and Rockford, and then there is a note here, "Dickson", meaning Richard L. Dixon, who is manager of national accounts in Chicago, "go to Karl Kiser," and this is once again referring [11] back to that July conversation that I had with Belle Hansen, and "sent a letter to Win Wilson." The point of Dixon getting to Karl Kiser, Downing was informed of what we did at Quaker, but they weren't convinced that we hadn't done something to the prices, so the idea here was for Dick Dickson to get to Karl Kiser and explain the actual circumstances of the case.

I subsequently asked Dick Dickson if he had gotten Karl Kiser, and he said, "I have called him three times, and I haven't been able to get to him. If he wants anything, he'll have to come to me. I'm not going to bother with him anymore." That was it.

Q. Referring to your notes on Page C082, that should be in the second book.

A. This is an October 31, 1975 conversation, and this is a conversation with Ron Yates, who was general manager of our Belleville plant, and we were discussing

a piece of business, the price that we should put on it, and he said that the board was moving January 1, 1975. OI was going to move their board price. We could go three percent on the piece of business on which we were talking—three percent down, that is—that he wouldn't go any more, that he would give up the business before he would go any farther, since board was going to move, and it had [12] been known in the industry that OI was going to increase their board prices.

Subsequently, we would hope that if they increased their board prices, they were increasing their costs, and therefore they would increase their selling price.

Q. What was the account involved in that?

A. I'm not certain. I think this was probably Quaker business for Danville, Illinois.

Q. Item No. 2, or Item No. 3?

A. Item No. 3.

Q. Would you look at Item No. 2, sir? Earlier you indicated that it involved a contract with Fairmount Foods.

A. Yes, this is a conversation with Dan Rudolph, who was general manager of our Lynchberg, Virginia plant, and at this time we were negotiating with Fairmount Foods to acquire some of their business. Fairmount has a large plant in Raleigh, North Carolina that our Lynchberg plant would have been supplying, and we were at a disadvantage because our competition, Gaylord, had a plant in Raleigh.

They were warehousing boxes for Fairmount Foods. We would have had to warehouse boxes also, but not having a plant there we would have had to pay for [13] outside warehousing.

It says here, "Gaylord cut the price." Well, Gaylord cut the price the previous year to get the business. They were also not charging for warehousing, so Mr. Rudolph

informed me here that he can't compete with Gaylord, but it would be okay for us to go five percent down from the present levels which were supplied to us by Fairmount Foods, and also to extend their terms. The normal terms in the corrugated box business are one percent ten, payment terms that is, one percent ten, net thirty, and we were going to extend them to one percent, fifty-nine, net sixty.

In other words, they would get one percent discount after fifty-nine days, and they would pay the net bill after sixty.

Q. In your earlier interview you also said that Item 3 referred to the Fairmount Food contract, is that correct?

A. That could have been, yes, now that I see this. This is for Cass Foods in Centralia, and not Quaker Oats. I would like to correct that for the record.

Q. Directing your attention to Page C095, would you relate the substance of that conversation?

[14] A. This is a conversation that took place on November 18, 1976, and I received a phone call from one of our men in Clayton, Missouri by the name of Jim Flavin. And he said that Tom Gordon, who was the regional manager of our southern region, had received a phone call from Fred Renshaw, who was vice-president of sales for Alton Box, and Renshaw says that we had cut the Snackmaster price at Jeffersonville, Indiana, and Flavin was calling to ask if Fairmount Foods did the buying for Snackmaster, and what is the relationship. Well, as far as I know, I had never heard of Snackmaster, and there was no relationship with Fairmount Foods, and that was the end of our conversation.

Q. Did you give that to Alton Box?

A. No, I did not.

Q. And the conversation referred to on Page C105?

A. There is no date on the 105, but the previous date was December 11, 1975. I received a phone call from one Chuck Joyce, who was an employee of Westerncraft, and Weyerhaeuser and Westerncraft shared business at Michigan Fruit Company in Benton Harbor, Michigan, and Miles Laboratory in Chicago.

Both pieces of business were up for quote [15] on January 1st, and Chuck Joyce called me and asked me what we were going to do at those two locations, and I informed him that I was not on the phone and couldn't talk.

Q. What does "not being on the phone" mean?

A. We will not accept phone calls in regard to business from competition, or communications are off.

Q. And anyone in the industry you told that to would understand what "not being on the phone" means?

A. Yes.

Q. And why were you not on the phone as of that date?

A. Well, back in about January of 1975, Mr. Win Wilson called me and informed me that we were off the phone, and if there was any report of communications between any Weyerhaeuser employee and any competitor that the Weyerhaeuser employee was subject to immediate dismissal without any explanation, so I immediately went off the phone.

A Grand Juror: What is your position with Weyerhaeuser?

A. I'm a national accounts salesman.

A Grand Juror: Where?

[16] A. In Chicago.

A Grand Juror: What was the date you said you were off the phone?

A. Early in January, 1975.

Q. (By Ms. Garrett) So that directive to go off the phone was for all Weyerhaeuser employees, is that correct?

A. Yes.

Q. However, from what we have seen or covered subsequently, you did have co-employees or other employees of Weyerhaeuser who were still on the phone?

A. There could have been, yes.

Q. Isn't that apparent from the information you have given us?

A. Yes.

Q. Directing your attention to Page 106 of your notes, would you relate that conversation to us?

A. This is a conversation with D. Thoren, who was the sales manager of our Rockford plant, and a supplier of boxes to Miles Lab, and he tells me here that at Miles Lab he's going to go up six percent on March 1, 1976.

Q. Is that Item 15, sir?

A. Item 10, I'm sorry. Oh, this was Jack Mannix, and has to do with Michigan Fruit.

[17] Q. Who is Mr. Mannix?

A. Mannix, I'm sorry, was the sales manager at our Three Rivers plant, and he's telling me here that he is raising Michigan Fruit six percent on the 15th of January, 1976. And Bob Savage wanted all prices up January 1, 1976.

Q. Do you know whether Mr. Mannix talked to Mr. Joyce about this entry?

A. I don't know.

Q. Directing your attention to Page C114, would you try to approximate a date for that conversation?

A. Well, it's after January 15 and before January 27th.

Q. What year?

A. It has to be 1976. My book says 1973. This is a conversation I had with Mr. Blaine Murray, who was general manager of our Alameda, California plant, and it had to to with the Libby, McNeil, Libby account that we were working on at that time.

And Murray is telling me that on the West Coast all cannery cases are going up six percent April 1, 1976, and that Fiberboard will announce their date of increase at a later date. Fiberboard being of interest because Fiberboard was sharing the business with Weyerhaeuser at Libby's Sunnyvale, California [18] plant.

And then there is some other information here that Fiberboard is going to sell their business and previously it was rumored that St. Regis was going to buy the business.

Q. On Page C120—

A. This is February 9, 1976 conversation with Ray Beetle, who was the sales manager working under Mr. Murray at our Alameda plant, and it has to do with the Libby account there, and at the time we were hoping to be able to run ahead for Libby so that they would have their boxes in storage. And they had a storage plant where they ordinarily stored cans. They did not need all the can space that they had set aside, and we were going to put our boxes in the Libby plant, and pay Libby on a square footage basis for storing the boxes.

Q. Did you receive prices on Libby?

A. No, I got prices on Libby from Mr. Ken Brown, who gave me the—Mr. Ken Brown is the purchasing agent at Libby, and he gave me the numbers, the prices that I would have to meet, those being Fiberboard prices at Sunnyvale, and I gave those prices to Mr. Murray, and he said that he would meet the Sunnyvale level.

and six sixteenths inches deep. Now, that's standard in the industry. Everybody who makes the can makes that.

Therefore, everybody's box into which they put twenty-four of these cans would be the same size; so that we identify as a commodity, and there is a commodity price list issued, so that it was issued to makers of the boxes and users of the boxes. It was standard in the industry.

And in this conversation Mr. Bob Savage is telling me that that price list is not valid anymore, that it was "clobbered"; and those were his words. I guess I wrote it down. Clobbered by Inland at Larson—Larson being a cannery. And Inland's salesman went [21] around the industry and told everyone they were cutting prices six percent. He then informed me that levels in Wisconsin were now eight percent off the Wisconsin can list.

Q. To the best of your knowledge, did anyone at Weyerhaeuser call to complain to Inland?

A. I am not aware that anyone did. To the best of my knowledge, I don't know.

Q. And you did not call them?

A. No.

Q. All right, thank you, sir. At the interview you and your attorney indicated that what you just covered in only two of the seven books you submitted indicated all the price exchange information that occurred in that time period, is that correct?

A. Yes.

Q. Each of the stenopads average about eighty pages, and you feel relatively certain that in those few instances you have covered all the price exchanges relative to this investigation?

A. I do.

Q. And we also asked you which other companies you might have had communications with yourself with respect to prices in the corrugated industry.

A. Yes.

[22] Q. At that time you indicated the following companies—and I'll read you that list to see if that is your recollection of what happened. Acorn, Alton, Bell Fiber, Container, Continental, Corco, Downing, Green Bay, Hankins and/or McMillan-Bloedell, Hoerner-Waldorf, Inland, International Paper, Mead, Minasha, Olinkraft, OI, Packaging Corporation, St. Joe, St. Regis, Southwest Forrest, Stone, Union Camp, Wabash, Westerncraft and West Vaco.

Is that your recollection of the companies you had price communications with?

A. In the period prior to January 1st of 1975, that is the list that I denoted that I had had conversations.

Q. Sometime after January 1, 1970?

A. That's correct.

Q. We'll go over some of the persons you stated that you had conversations with, and we would like for you to recall those exchanges, if you could. You mentioned that you talked to Joseph Kilcullan at Container.

A. Yes.

Q. Frequently up to 1974?

A. Yes.

Q. Do you recall the accounts you discussed?

[23] A. Offhand, I don't. The one account that I can recall having some discussions with him was in regard to the Schlitz beer account, and it was in regard to what they were going to do with the account at that time, and the conversation got kind of involved and it was decided that he would contact Ted Fajen, who is our salesman handling that account, himself, direct, and I was removed from the picture on that particular account.

Q. Were these telephone conversations with Mr. Kilcullan?

A. Yes, they were.

Q. Who initiated those phone calls?

A. It could have been either he or me initiating the phone calls.

Q. You indicated at the interview these continued up till 1974. Is that the time you got off the phone?

A. Early in 1974. Early in 1974 Mr. Kilcullan called me and told me that they were no longer on the phone, that there would be no further communications.

Q. With respect to the Schlitz account, do you recall the year that you were discussing that account?

A. It was probably in 1972 or 1973.

[24] Q. And was that with respect to Schlitz in one location, or was it in the entire account across the nation?

A. Well, it would be the entire account.

Q. And the purpose for your exchange was for price stabilization, is that correct?

A. Yes.

Q. (By Mr. Kroemer) What prompted Mr. Kilcullan calling you and telling you he was off the phone?

A. Well an order went out, I guess, that at Container Corp., the same as Weyerhaeuser, that there would be no further communications with competitors.

Q. Now, you said Win Wilson called you sometime in 1975?

A. Yes.

Q. With a similar order to you?

A. That's correct.

Q. Is that the first time you had ever been told not to communicate pricing information with competitors?

A. No.

Q. It was not?

A. No.

Q. When were you previously told that?

[25] A. There were two letters that came out, one in 1972, and the other one I cannot recall the date, signed by Jack Wekter, with instructions that there was to be no further communications—there was to be no communications, period. And accompanying that letter was an excerpt from the law by Francis Karaken, Karaken being the chief legal counsel for Weyerhaeuser Company.

Q. All right, were you familiar with what is known as the Greensboro case?

A. Yes.

Q. Were you familiar with it at the time it was decided back in 1970, and the company put out a directive at that time?

A. Yes.

Q. What was your understanding of that case as it related to price communications?

A. That price communications were illegal.

Q. Price communications with other corrugated producers?

A. Right, for the purpose of setting prices.

Q. Similar to what you were talking about with Mr. Kilcullan?

A. Yes.

Q. You understood that that was an illegal [26] communication?

A. Yes.

Q. Okay, so Weyerhaeuser had had several policy statements saying that you should not communicate with competitors, and you were aware these communications were illegal, yet you continued to do it, is that right?

A. Yes.

Q. Now, Mr. Wilson again in early '75 told you not to do it. Why did you then quit doing it, if you had ignored all the previous orders?

A. Well, my position had changed. Prior to 1975 I was the regional sales manager for the central region of Weyerhaeuser Company, working under a man by the name of Robert McNaughton, and it was at McNaughton's behest that the phone calls were made, and at this direction. And then after 1975 I went in national accounts and was working directly for Mr. Wilson, so I took orders from Mr. Wilson and not from Mr. McNaughton.

Q. (By Ms. Garrett) Sir, could you clarify those dates for us? Are we talking about early 1974, or early 1975?

A. Early 1975.

Q. When the directive came out from Mr. Wilson?

[27] A. Yes.

Q. Yet in 1974 you told Kilcullan that you were off the phone?

A. No, he told me he was off the phone.

Q. Do you recall your conversation about prices with anyone at Alton Box?

A. I had conversations at Alton Box with a man by the name of Forrest Bornegreve in regard to the Quaker Oats account in 1973. These dates are very difficult. And on the Wilson account also at the same time. I also talked to a man by the name of Herman. I can't recall his first name.

Q. Could that be Dick Herman?

A. Dick Herman.

Q. What was his position?

A. Dick Herman was, I believe, national accounts manager for Alton Box. And this goes back to 1973 when I was working for Mr. McNaughton. I was not able to complete most of my—get most of the information that I needed from Mr. Herman, and McNaughton took over and talked to Herman himself after that.

Q. Do you recall the accounts that were discussed?

A. No, I do not at this time, I'm sorry.

[28] Q. Did you talk to Mr. Renshaw at all?

A. Fred Renshaw, who was vice-president of sales, I talked to him on occasion, and I cannot recall the accounts, but I did have conversations with Mr. Renshaw going back to 1970 through about 1972.

Ms. Garrett: Let's take a break now.

Mr. Kroemer: Mr. Foreman, do you want to take a five minute break now?

The Foreman: Yes.

Mr. Kroemer: We will recess your testimony for about five minutes.

(Thereupon a recess was taken.)

Q. (By Ms. Garrett) Sir, let me remind you that you are still under oath. Did you also have price communications with a Don Alexander at Container Corporation?

A. Continental Can.

Q. Continental Can?

A. Yes, I did.

Q. When was this?

Q. This was in 1972 and 1973. I had conversations with Alexander both on the phone and in person. I cannot recall the accounts that we discussed.

Q. Did you discuss prices with him at FBA meetings?

[29] A. At one FBA meeting, yes, that I can recall definite.

Q. Did you have price communications with Mr. Pettengill at Corco?

A. Yes, I did. The conversation I had with Mr. Pettengill had to do with Kerr Glass located at Dunkirk, Indiana, that Weyerhaeuser had in 1973, I believe it was, or '74, we intended to raise the price six percent,

and I so informed Mr. Pettengill that we were raising the price six percent.

Q. Did you have price communications with John Jackson at Hoerner-Waldorf?

A. Yes, I called John Jackson and asked him for—this goes back to about 1971—asked him for his prices on Midland Glass in Terre Haute, Indiana, and Mr. Jackson sent me his price list.

Q. By mail?

A. By mail.

Q. Did you also talk to Charles Jackson at Hoerner?

A. Yes, with Mr. Charles Jackson I discussed the Metro Glass account, and that goes back to about 1972. And I informed Mr. Jackson that we had raised our price, I believe it was six percent, and he said that all he could get was three out of it.

[30] Q. This was a telephone exchange, wasn't it, to Charles Jackson?

A. Yes, I believe it was.

Q. And which of you called?

A. I don't recall.

Q. Do you recall that he made the telephone call to you?

A. No. I don't think it was a telephone call. I think I met him at an FBA meeting and we discussed that.

Q. Did he initiate the discussion about prices?

A. No, I probably did.

Q. Did you have conversations with Inland Container Corporation?

A. Yes, I did. I had conversations with Mr. Don McGovern at Inland in regard to Quaker Oats at Danville, Illinois, and I gave Mr. McGovern the prices that we had submitted for that location.

Q. He had called you on those prices, hadn't he?

A. Yes. I also previously had conversations with a man by the name of Jack Cummings of Inland that had to do with U. S. Gypsum in the Gypsum, Ohio location, and I had—the name is gone again—

[31] Q. Would it be Nick Summers?

A. Mr. Nick Summers, Inland, I had conversations with him about—I can't recall the account, but I had more than one telephone conversation with Summers. Some I called him and others he called me.

Q. Can you place the years of those three conversations?

A. Probably in 1972, 1973, in there.

Q. Would it have been 1975 or later?

A. No.

Q. Did you have communications with International Paper Company?

A. With International Paper, going back to 1971, I had communications with Mr. Denny Molahan, who was manager of the Chicago plant for International Paper, and subsequent to that, up until the middle of 1973, I had conversations with Mr. Dave Stevens of International Paper.

Q. Did you ever discuss prices with either of these men at FBA meetings?

A. After an FBA meeting, over cocktails, yes.

Q. Who initiated these price discussions?

A. It could have been either one of us.

Q. And who did you discuss prices with at the Mead Corporation?

[32] A. Going way back, 1970, in that period, I had conversations with Mr. Norris Downing of Mead. One conversation I recall had to do with General Electric. Others, I don't recall the name of the account.

Q. What was Mr. Downing's position at Mead?

A. Norris was president of Mead at that time.

Q. What was your position at Weyerhaeuser?

A. I was regional sales service manager.

Q. Did Mr. Downing initiate this discussion in this account?

A. In most instances I initiated the calls.

Q. Is that usual for someone in that capacity to call the president of another corporation about prices?

A. I doubt it's usual. It's just that Mr. Downing was the only one at Mead that I knew. I had met him and we seemed to get along pretty good, so I called him.

Q. And did he give you prices?

A. Yes.

Q. Who did you discuss prices with at Owens-Illinois?

A. The sales manager in the Chicago plant.

Q. Clarence Perry?

[33] A. Clarence Perry. I discussed in 1973 or 1974 the Libby prices. Owens-Illinois were suppliers on the West Coast, and they had put prices in for their boxes out there, and I had submitted prices also. And Libby was forcing me to go lower than Owens-Illinois, and we had discussed the comparative prices that we had in there.

Q. You did state earlier, did you not, that you had discussions with Mr. Bob Haynes at Packaging Corporation?

A. Yes, I did. I didn't today. In our conversation here, I did. Going back to—as I stated earlier, Quaker Oats put their business out for quote in April, and Mr. Haynes came to me sometime prior to June of—I think it was 1973, and said, "You know we have agreed that we will move the Quaker business fifteen percent", and I did not move the Quaker business fifteen percent, I moved it about eight percent. This bothered Mr. Haynes a great deal, so much so that he immediately contacted Mr. Wekter or Mr. Wilson, one of them, who got back to my boss, who was Mr. McNaughton at that time.

Q. You are talking about Mr. Winfield Wilson?

A. Mr. Winfield Wilson, yes. And they got back to my boss, Mr. McNaughton, as I stated, and wanted [34] to know why we didn't move fifteen percent, since there had been an agreement that that would be the figure. And Mr. McNaughton knew why we hadn't moved fifteen percent, and he explained it to Mr. Wilson, and what happened after that, I don't know.

Q. When were you communicating with St. Joe about prices?

A. At St. Joe, this goes back to about 1972 or 1973, and the fellow's name was Jack Kelly, and it had to do with some business down in Ohio that we were both quoting on, and I got to Kelly and told him what our prices were, and informed him of what our prices were.

Q. Did Mr. Kelly call you for that information?

A. No, he didn't, I called Kelly and gave him the numbers.

Q. Did you mail him a price list?

A. I think I did mail him a price list at the time.

Q. Who did you talk to at Stone Container?

A. The fellow's first name was Roy. It started with a "G", and I can't recall his last name. It has been a long time.

Q. Would that be Mr. Gowan?

A. Whom?

[35] Q. Mr. Gowan?

A. No.

Q. Was he a customer service manager?

A. He was customer service manager, yes. And he called me and I called him whenever there was any price information to be exchanged. And he left Stone about 1973, so it was prior to that that I had conversations with the man.

Q. You exchanged prices in that time?

A. Yes, I did.

Q. Who did you discuss prices with at Union Camp?

A. At Union Camp there was a man who was manager of the Chicago plant by the name of Roy Caponi, and I had—I can't recall the account, but I talked with Mr. Caponi about prices.

Q. Who did you discuss prices with at Olinkraft?

A. Lee Adam, out of their—I think their plant was in Cincinnati—having to do with Ross Labs in Columbus, Ohio, and we exchanged what our pricing policies were going to be in that account.

Q. Do you recall the year?

A. It was about 1973.

Q. Could it have been later than that, perhaps?

[36] A. It could have been 1974.

Q. As late as 1975?

A. No.

Q. Going back to some background information, you mentioned our failure to go into your background. For the benefit of the grand jurors, you are currently a national accounts salesman for Weyerhaeuser in Chicago, is that correct?

A. That's correct.

Q. How long have you been in that position?

A. Since January of 1975.

Q. Is that January, or July of 1975?

A. Well, it was fulltime, July of 1975. On a parttime basis, going back to early 1975.

Q. What was your position before then?

A. I was the central region sales manager in Worthington, Ohio.

Q. Who do you report to in your capacity as national accounts salesman?

A. Right now I report directly to Richard L. Dickson.

Q. Who is—

A. The national accounts sales manager for the middle of the United States.

Q. Who does Mr. Dixon report to?

[37] A. He reports to Winfield Scott Wilson in Tacoma, Washington.

Q. Who does Mr. Wilson report to?

A. He reports to John Savage, who is the manager of the corrugated box division of Weyerhaeuser.

Q. Has he always reported to Mr. Savage?

A. No, he has been reporting to Mr. Savage something less than a year. Prior to that he reported directly to Mr. Jack Wekter, who is vice-president in charge of the brown board division of Weyerhaeuser.

Q. Who did you report to while you were the regional marketing coordinator?

A. I was reporting to Mr. Robert McNaughton.

Q. And who did Mr. McNaughton report to at that time?

A. McNaughton reported—up until the end of 1973, he reported to Mr. Win Wilson. After that he reported to Mr. Jack Wekter.

Q. Is it a fair statement that in most of your communications Mr. Wilson would have been at least generally aware of them, because of the reporting hierarchy?

A. He may—he would not have been aware of any specific instances. He may have been aware that it was happening.

[38] Q. Would he have been even generally aware of the frequency which it was happening in your specific instance?

A. No, Mr. McNaughton was the one who was more aware of the frequency. McNaughton was the one who would be aware of my activities, rather than Win Wilson, when I was communicating with people.

Q. Can you recall any situations where Mr. McNaughton had to go to Mr. Wilson because of any extraordinary problems that arose?

A. The only thing I recall McNaughton and Wilson being involved in, in which I was also aware, was the Quaker bid for 1973 that I had previously stated.

Q. Is that the only one?

A. That's about the only one I can recall right now.

Q. McNaughton was the person you usually discussed prices with, is that correct?

A. That's correct.

Q. Did McNaughton ever tell you where he was getting prices from, the same prices he was passing on to you?

A. Yes, he did.

Q. In the interview you stated that you might [39] have but couldn't recall specifically having told Win Wilson about your price communications, yet he was aware of the ones by the Worthington, Ohio office, is that correct?

A. Well, I imagine that he was aware of what was going on with McNaughton, yes.

Q. Sir, in the interview you stated that Wilson told you that he was aware of those price communications. Is that still your statement?

A. Well, since he told me that there was to be no further communications in 1975, I would have to assume that he knew there had been communications previous to that.

Q. He did not tell you specifically there had been?

A. No.

Ms. Garrett: Mr. Foreman, would you see if the grand jury has any questions of this witness?

The Foreman: Yeah, are there any questions from the jurors?

A Grand Juror: These steno records, are those your personal records that you kept?

A. Yes.

[40] A Grand Juror: Day to day?

A. Day to day phone calls that I made. The purpose of them was to jot things down and the first thing I would do the next day would be go over the previous days phone calls and business that I had not completed, why, I would start again and return calls that were necessary to be made.

There are many things in there. If you called and said, you know, "It's snowing in Houston," why, I would have your name down and say "Snowing in Houston," and that would be the end of it. And if I couldn't get you I would put "WCB", will call back, and if you didn't call me back I would call you the next day, and that was the purpose of the book, the intentions in keeping it.

A Grand Juror: Is that the usual procedure for other people with other companies to do the same, or do you have any knowledge of that?

A. I have no knowledge of anybody else doing it. I wouldn't know.

The Foreman: Are there any other questions?

A Grand Juror: Were most of your communications on the telephone rather [41] than in person?

A. On the telephone, yes, ma'am.

A Grand Juror: Did you ever receive any printed or written out price lists, from any of your competitors?

A. Yes, ma'am, I received a price list on Midland Glass, from Mr. John Jackson.

A Grand Juror: Would you say that would be a rare occasion?

A. Very rare.

The Foreman: Are there other questions?

A Grand Juror: Where were these books kept that you have there?

A. When I would finish them, I would just throw them in the bottom drawer of my desk.

A Grand Juror: And they were there at all times?

A. Yes.

A Grand Juror: When they—I imagine they did come over and get some materials from your office.

A. Yes, ma'am.

A Grand Juror: Were those books there at that time?

A. Yes.

[42] A Grand Juror: They didn't bother with them?

A. No, ma'am. I was not in the office when the man went through my desk, and I don't know whether he looked at them and found them to be of no consequence, or whether he saw them.

A Grand Juror: So you don't know whether he was aware of them and just didn't turn them in?

A. I don't know.

The Foreman: That's all.

Q. (By Ms. Garrett) Could you explain for the benefit of the grand jurors why you kept those notebooks?

A. Well, when I first started as the regional sales service man, back in 1967, I previously worked for eighteen years for Weyerhaeuser in the milk carton division, and I came over to this division, and it was brand new to me, and we had ten plants at the time, and I used to average sixty, seventy or eighty phone calls a day, and it was impossible for me to keep everything straight without writing it down, so I started this back in 1967 or '68, and I continued it.

Q. You were not keeping them, then, to keep a record of price communications?

[43] A. No, I was not. Frequently, or it was always for my own benefit, because I might have to go back and refer to a conversation that I had had maybe three weeks before with someone.

Q. If I may presume upon our jurors' questions, the fact that they were not produced in the initial submission was not an attempt to secret them from the grand jury?

A. No.

A Grand Juror: Was any of your superior officers aware that you had these records?

A. They may have seen me writing and know that I wrote them, but they were not of any consequence that they would make a special purpose to make a note to themselves that I was keeping them.

A Grand Juror: Were you ever told to destroy any of your records?

A. No, ma'am.

The Foreman: Any other questions?

A Grand Juror: Just one further question. Was there any compartment in your office locked at any time where books may have been kept, any locked compartment?

A. There is not a lock in my office.

[44] A Grand Juror: Was your desk locked?

A. My desk has a lock, but I have no key for it.

A Grand Juror: In other words, it was easy access to the people that went in and investigated?

A. Yes. I do not keep files in my office, so the only thing that the man when he came would be to go through my desk.

A Grand Juror: Could we see one of those books?

A. Certainly, ma'am. (instrument handed to grand juror) I hope you don't try to read it.

A Grand Juror: I just wanted to know why they were not noticeable and why they would leave them.

Ms. Garrett: May I point out for the benefit of the grand jury that when I numbered those, you will see little labels in there, and they are simply to keep the pages

in a way so that you have an accurate source. There are seven books with eighty pages apiece, and we only covered ten relevant price communications, none of which seem to implicate Mr. Conboy [45] himself. So you can see that for the most part they were innocuous.

A Grand Juror: It just seems very unusual since we have not had any personal records brought in as such where people kept notes.

Q. (By Ms. Garrett) I have a question since I was not here when the documents were submitted. Did you ever see the subpoena that was sent to your company?

A. No, I did not.

Q. Were you told of it?

A. Yes, we were informed.

Q. Were your telephone logs requested?

A. No. They requested our daily diary, where we were, with whom we had lunch and things like that, and they were turned in.

Q. Had a telephone log been requested in those terms you would have turned over those stenopads?

A. I don't know. I suppose if anybody wanted them I would have been glad to give them to them, yes, if they specifically asked, but they were just a notebook thrown into an empty drawer as far as I was concerned.

Q. Did you not consider them your telephone [46] log as such?

A. No. Looking back on it and taking it in the context of which we are speaking now, yes, it definitely was a telephone log, but at the time that I'm preparing it, why, I don't consider it a log. It's just what I'm doing today and what I may have to do tomorrow, is the only purpose of it.

The Foreman: Are there any other questions? We have no further questions.

Ms. Garrett: You may excuse the witness. We would like to thank you for appearing.

The Witness: Thank You.

(Witness was excused.)

(Thereupon a recess was taken.)

(Certificate of the Clerk of the Grand Jury omitted in printing.)

(Certificate as to correctness of transcript and correction pages thereto omitted in printing.)

Opposition

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No. 81-825

In the

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION, APPEAL OF JOHN A. CONBOY, DEPONENT,

THE PILLSBURY COMPANY, et al., OPT-OUT PLAINTIFFS,

Petitioners,

vs.

JOHN A. CONBOY,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

MICHAEL W. COFFIELD
KEVIN M. FLYNN
ANDREW F. SEARS
COFFIELD UNGARETTI HARRIS & SLAVIN
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400
Attorneys for Respondent, John A. Conboy

November 30, 1981

QUESTION PRESENTED

The threshold question presented is whether this Court should exercise its discretion and review on writ of certiorari the *en banc* opinion rendered by the Seventh Circuit Court of Appeals reversing the order of civil contempt entered by Judge John V. Singleton, Jr. against Respondent, John A. Conboy, for his assertion of the Fifth Amendment privilege at civil deposition. The *en banc* opinion below is the only decision which has addressed the several legal issues raised by Mr. Conboy's appeal and definitively ruled on those several issues after full consideration and discussion of all other circuit courts which have touched upon the basic issues raised herein.

In the event this Court determines that further review by this Court is warranted, the questions which should be considered by the Court necessarily extend well beyond the narrow question cited by Petitioners to include the several legal issues addressed by the Seventh Circuit *en banc* decision under review, which are as follows:

1. Whether Judge Singleton erred in his assessment of the legitimacy of Mr. Conboy's Fifth Amendment assertion by basing his determination on a factual estimate of the likelihood of prosecution in contravention of the guidelines previously delineated by this Court?

2. Whether Judge Singleton erred in compelling Mr. Conboy to testify in the absence of a separate and independent grant of use immunity given by the appropriate governmental authorities when Mr. Conboy, had he testified, would thereby have been compelled to give answers which could tend to incriminate him?

3. Whether Judge Singleton's prediction that Mr. Conboy's compelled civil deposition testimony would be found to be inadmissible in a future criminal

prosecution inadequately supplants Mr. Conboy's Fifth Amendment privilege against self-incrimination?

4. Whether, since neither federal nor state enforcement agencies are parties to this proceeding, there is a possibility that they will be able to relitigate the issue at a later time and use Mr. Conboy's compelled testimony against him in a criminal proceeding?

5. Whether, by attempting to grant Mr. Conboy a type of "de facto" use immunity, Judge Singleton acted in violation of the explicit language and legislative intent of the immunity statute and beyond the proper scope of his authority?

6. Whether Judge Singleton placed Mr. Conboy's Fifth Amendment rights in jeopardy by compelling him to testify in the absence of any showing of need for such testimony by Opt-Out Plaintiffs?

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CITATIONS TO OPINIONS BELOW

The Contempt Order entered by Judge Singleton on May 22, 1981 which is the subject of Mr. Conboy's appeal has not been published or otherwise reported but is attached hereto as Appendix A. The majority panel opinion and dissent of Judge Sprecher rendered by the Seventh Circuit Court of Appeals on July 17, 1981 is cited as *In Re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 655 F. 2d 748 (7th Cir. 1981). The *en banc* opinion rendered by the Seventh Circuit on October 16, 1981 has been reported at 1981-2 Trade Cas. ¶64,334.

For the convenience of reference of the Court, citations to the *en banc* and panel opinions below in Mr. Conboy's opposition brief will be to the page numbers of the official slip opinions attached to Petitioner's Petition as Appendix A.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-825

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION, APPEAL OF JOHN A. CONBOY, DEPONENT,

THE PILLSBURY COMPANY, et al., OPT-OUT PLAINTIFFS,

Petitioners,

vs.

JOHN A. CONBOY,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The Respondent, John A. Conboy, was one of several immunized grand jury witnesses in an investigation into an alleged nationwide conspiracy to fix prices in the corrugated container industry. That investigation culminated in the indictment of fourteen companies and twenty-six individuals in two separate cases from which this civil antitrust litigation, M.D.L. 310, emanates. During the course of the investigation, Mr. Conboy submitted to an interview with Department of Justice attorneys after

receiving a letter promise of immunity from J. Albert Kroemer of the Department of Justice, Antitrust Division. Mr. Kroemer's letter of January 10, 1978 stated in pertinent part that:

> the information which you reveal in the course of the interview and the transcript derived therefrom, along with the personal documents which you deliver to us, will be given the same treatment and protections afforded statements made before a grand jury pursuant to a court order compelling testimony and granting immunity.

Relying on this promise of immunity and on the secrecy of grand jury proceedings, Mr. Conboy answered numerous questions concerning his knowledge of alleged price communications among suppliers in the corrugated container industry.

Pursuant to an Order of the District Court entered after certification by the United States Attorney that Mr. Conboy's testimony "may be necessary to the public interest" (18 U.S.C. §6003 (b)(1)), Mr. Conboy subsequently was given a separate and independent grant of use immunity covering his live testimony before the grand jury. Pursuant to this Order of Immunity, Mr. Conboy testified before the grand jury reiterating the information provided during his earlier interview and expanding upon his knowledge of alleged price communications in the corrugated container industry.

Following the conclusion of the criminal trial, numerous treble damage civil actions including class actions were brought in various United States courts. *In Re Corrugated Container Antitrust Litigation*, M.D.L. 310, is a consolidation of those actions, pursuant to 28 U.S.C. §1407. The class action plaintiffs in that litigation previously settled their claims against all but one defendant.

The trial against that defendant has not been finalized in the District Court. In addition, nineteen "opt-out" cases also remain pending before Chief Judge John V. Singleton, Jr. of the Southern District of Texas. Remaining defendants in the opt-out cases scheduled for trial in 1982 include companies named earlier in the criminal indictments as well as a number of companies that were not indicted. The Opt-opt Plaintiffs allege, among other things, that the defendants were engaged in an ongoing price-fixing conspiracy in the corrugated container industry through 1978, and that they have fraudulently concealed said conspiracy.

The Opt-out Plaintiffs subpoenaed several previously immunized grand jury witnesses, including Mr. Conboy, for deposition testimony and production of documents. Pursuant to a subpoena issued from the United States District Court for the Northern District of Illinois, Mr. Conboy appeared with counsel in Chicago for his deposition on May 20, 1981. During the initial stages of his deposition, Mr. Conboy answered several questions concerning the dates and general nature of his past employment with the Weyerhaeuser Company, one of the defendants in the litigation. Counsel for the Opt-out Plaintiffs then asked Mr. Conboy to confirm that he had testified at a Department of Justice interview in Dallas, Texas on January 10, 1978, and had subsequently testified before the Corrugated Container Grand Jury in Houston on January 18, 1978. Mr. Conboy then was asked to identify and authenticate transcripts of his interview and live grand jury testimony and to attest to the truth of that prior testimony. In addition to his counsel's objections to this line of inquiry based upon the grand jury secrecy provisions of the Federal Rules

of Criminal Procedure (Fed. R. Crim. P. 6(e)), Mr. Conboy asserted his Fifth Amendment privilege aganist self-incrimination in response to these questions. He did acknowledge, however, that any testimony which he may have provided the government in connection with its investigation of the corrugated container industry was given pursuant to prior grants of immunity.

The balance of the questions put to Mr. Conboy during the deposition were comprised of questions previously asked by Department of Justice attorneys during Mr. Conboy's interview on January 10, 1978. All questions concerned Mr. Conboy's alleged involvement in pricing communications and activities during his tenure as Regional Marketing Coordinator for Weyerhaeuser's Central Region located in Worthington, Ohio. Mr. Conboy asserted his Fifth Amendment privilege in response to these questions and his counsel advised counsel for the Opt-out Plaintiffs that Mr. Conboy would invoke his Fifth Amendment privilege in response to all further questions concerning pricing communications or activities.

Counsel for the Opt-out Plaintiffs then suspended the deposition and telephoned Judge Singleton in Houston seeking an immediate ruling compelling Mr. Conboy to testify over his Fifth Amendment invocation. Judge Singleton was advised of the operative facts concerning Mr. Conboy's employment in the corrugated container industry and that Ohio has no antitrust statute of limitations. In addition, counsel for Mr. Conboy advised the court that the use of prior immunized testimony by counsel for the Opt-out Plaintiffs in formulating the questions posed to the witness did not affect the legitimacy of his Fifth Amendment assertion and that Mr. Conboy's fear of self-incrimination was based upon the nature of

his answers to the deposition questions regardless of their source.

After advising the parties that he was empowered to sit as a district judge in Illinois under 28 U.S.C. §1407, Judge Singleton questioned Mr. Conboy regarding his employment history in Ohio and the existence of any pending criminal investigation in that state to which Mr. Conboy was a witness or party. Due to Mr. Conboy's inability to establish the existence of such a pending criminal investigation in Ohio relating to the corrugated container industry, Judge Singleton ordered him to answer all questions previously asked of him in his interview or live grand jury testimony. When Mr. Conboy persisted in asserting his Fifth Amendment privilege, Judge Singleton found him to be in civil contempt pursuant to 28 U.S.C. §1826, fined him $5,000 and imposed a six-month term of imprisonment. Judge Singleton stayed execution of the order pending appeal.

An expedited appeal followed under the provisions of the recalcitrant witness statute, 28 U.S.C. §1826. The panel majority of the Seventh Circuit Court of Appeals upheld the order of civil contempt on the narrow basis of their conclusion that

> Because the questions asked in this deposition were taken verbatim from or closely tracked the transcript of Conboy's grand jury testimony, we believe the answers at the deposition would be 'derived from' the prior immunized testimony and therefore would be unavailable for use in any subsequent criminal prosecution.

In Re Corrugated Container Antitrust Litigation, Appeal of John Conboy, No. 81-1960, Slip Op. at 35a (7th

Cir., July 17, 1981) *rev'd on rehearing en banc,* No. 81-1960 (7th Cir., October 16, 1981) (hereinafter "Panel Op.").

In a comprehensive dissenting opinion, Judge Sprecher noted that the panel majority decision had overlooked the bulk of the essential legal issues presented for review and misapprehended the one point of law upon which they relied. Panel Op. at 41a, *et seq.*

Mr. Conboy petitioned the Seventh Circuit for a rehearing *en banc.* On September 2, 1981 the petition was granted. A copy of the court's order granting Mr. Conboy's petition for *en banc* reconsideration is attached to the Petitioners' Petition as Appendix A. In a four-to-one opinion, the Seventh Circuit Court of Appeals adopted and republished Judge Sprecher's dissenting opinion from the majority panel decision as the *en banc,* majority opinion *In Re Corrugated Container Antitrust Litigation, Appeal of John Conboy,* No. 81-1960 (7th Cir., October 16, 1981) (hereinafter "*En Banc* Op.). In so doing, the *en banc* panel finally resolved the two major issues raised in the appeal: 1) That Mr. Conboy continues to face a legitimate fear of possible prosecution by both federal and state authorities that is more than fanciful; and 2) that Mr. Conboy's answers to questions based on earlier immunized testimony constitute an independent source of evidence not protected by his prior grants of use immunity and, thus, Mr. Conboy is entitled to continue to invoke the protection of the Fifth Amendment. The *en banc* Court thus reversed the contempt citation.

REASONS FOR DENYING THE WRIT

I.

THE *EN BANC* OPINION BELOW IS THE ONLY DECISION TO ENCOMPASS THE SEVERAL ISSUES RAISED IN THIS APPEAL AND, THUS, THERE IS NO CONFLICT FOR THE COURT TO RESOLVE.

The *en banc* decision of the Seventh Circuit Court of Appeals is a comprehensive and lucid opinion that effectively and persuasively resolves whatever differences existed among the circuits on the issue of whether new answers to questions based on earlier immunized testimony are, as a matter of law, necessarily themselves immunized or remain subject to Fifth Amendment protection.

The Seventh Circuit Court of Appeals *en banc* decision below is the only circuit court decision which addresses the *several* legal issues raised by Mr. Conboy's assertion of his Fifth Amendment privilege in the context of a civil deposition where his prior immunized testimony previously had been made available to his interrogators. As the most recent circuit court decision, the *en banc* panel had the benefit of the reasoning of the various preceding decisions which have touched upon the broad issue presented in this and similar appeals: Whether a court can deny a non-party deponent in a civil proceeding the protection of the Fifth Amendment if it concludes that the answers to questions asked will be so "tainted" by previous grants of use immunity that those answers will be found to be inadmissable by another court in a subsequent criminal proceeding. As Judge Sprecher noted in the *en banc* opinion,

> There is a conflict of opinion among the circuits on this question. In *Franey* [*In Re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086 (5th Cir. 1980)], the Fifth Circuit held that answers to verbatim questions from prior immunized testimony were not protected by the original immunity grant. But in *In Re Corrugated Container Antitrust Litigation, Appeal of Phillip Fleischacker*, 644 F.2d 70 (2d Cir. 1981), and in *In Re Order of Civil Contempt, Appeal of Carlos Lee Starkey*, 600 F.2d 1043 (8th Cir. 1979), the Second and Eighth Circuits held that such answers were protected.

The court found that "[i]n our opinion, the better reasoning is found in the *Franey* decision". *En Banc* Op. at 15a. It is readily apparent that the *en banc* opinion below has resolved whatever conflict may have existed among the circuits on this broad issue in a persuasive and comprehensive manner. Granting the Petition for a Writ of Certiorari would, therefore, constitute an improvident application of this Court's time and resources.

In addition to the two broad issues raised by the appeal, the *en banc* majority below is the only court to have addressed what it referred to as the several "serious practical problems" with compelling Mr. Conboy to testify over his Fifth Amendment assertion. *En Banc* Op. at 24a.

First, the *en banc* majority, citing to this Court's opinion in *United States* v. *Apfelbaum*, 445 U.S. 115, 123 (1980), and *United States* v. *Housand*, 550 F.2d 818 (2d Cir. 1977), found that compelling Mr. Conboy to answer questions previously asked under grant of immunity could subject him to prosecution for perjury or giving false statements under 18 U.S.C. §1623(c), even without a specification in the indictment as to which answer is false, *En Banc* Op. at 24a.

Second, the *en banc* majority found that Mr. Conboy would face a "serious problem of waiver" if he were to stray beyond the four corners of his earlier immunized testimony, citing this Court's opinion in *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). *En Banc* Op. at 25a.

Finally, the *en banc* majority found that whatever evidentiary obstacles confront the admissability of Mr. Conboy's grand jury testimony at trial would most likely confront Mr. Conboy's compelled deposition testimony. The risk that Mr. Conboy's grand jury testimony might not be admitted was preferable to taking the risk that Mr. Conboy's compelled deposition testimony might be held admissable against him by another court in a future criminal prosecution. *En Banc* Op. at 26a. As stated by the *en banc* majority, "[a]ny inconvenience to the plaintiffs must pale in the face of denial of the fundamental right against self-incrimination." *En Banc* Op. at 27a.

There is no conflict between or among any of the circuit courts of appeal on these several additional controlling legal issues because no other circuit decision has addressed them.

In contrast to the *en banc* majority's analysis of the several legal issues raised in this appeal, the Eighth Circuit's decision in *Starkey* addressed only the broad single issue involving the concept of "derived use" of immunized testimony. Moreover, *Starkey* was the first decision to consider the concept of "derivative use" under circumstances similar to those involved in this appeal. As such, the Eighth Circuit did not have the benefit of previous decisions on the issue. *Starkey*, furthermore, does not emanate from the corrugated container anti-

trust civil litigation as do *Fleischacker*, *Franey* and the Seventh Circuit *en banc* decision below. Thus, *Starkey* should be regarded as an initial but incomplete analysis of the scope of use immunity under the circumstances presented and less than persuasive on the issues affecting and emanating from the corrugated container antitrust civil litigation. For these same reasons, *Little Rock School District* v. *Borden, Inc.*, 632 F.2d 700 (8th Cir. 1980), a case in accord with *Starkey*, is also inapplicable.

Of the three circuit court decisions emanating from the corrugated container antitrust civil litigation, only the Second Circuit's opinion in *Fleischacker* differs significantly from the Seventh Circuit *en banc* decision below. The *Fleischacker* opinion addressed the issue of whether new answers to questions based on earlier immunized testimony are themselves immunized. However, as the *en banc* opinion notes, the *Fleischacker* decision acknowledges, but does not resolve, the problem that its broad interpretation of the concept of "derivative use" of immunized testimony results in improper *de facto* grants of immunity by courts:

> As the *Franey* court stated, 'even if the court's finding that the witness' testimony would be 'derived' from immunized testimony were manifestly wrong, the court's order compelling the testimony would operate to immunize the testimony because of the 'well-established [exclusionary] rule' . . . . 620 F.2d at 1093.
>
> In a curious footnote, the *Fleischacker* court conceded the very real danger of de facto immunity. That court acknowledged that the exclusionary rule does indeed result in de facto immunity; emphasized that the exclusionary rule was solely remedial and

> thus could not be used to justify a denial of the Fifth Amendment's protection; and then stated that conferral of de facto immunity was unauthorized. 644 F.2d at 78 n.13. But the *Fleischacker* court reasoned that no de facto immunity would occur because it was convinced that the *answers* to a subsequent deposition would necessarily 'derive from' the previous immunized testimony.

En Banc Op. at 20a. Indeed, the *Fleischacker* opinion recognizes the logic and rationale of the *Franey* decision, yet rules to the contrary.

While *Fleischacker* is factually similar to *Franey* and the *en banc* decision below, the decision was based solely on the court's reliance upon the rationale of *Starkey* over that of *Franey*. The court provided no additional independent basis for its ruling and should not be construed as in direct conflict with the *en banc* decision below. Moreover, *Fleischacker* expressly refused to consider any claim by the deponent-appellant that his invocation of the Fifth Amendment privilege was justified because his subsequent testimony might be used against him in a prosecution for perjury pursuant to 18 U.S.C. §1623(c), based on his prior immunized testimony. The *Fleischacker* court so refused because

> Fleischacker never claimed before the district court that the incrimination he feared related to perjury in prior testimony. Therefore, the point is not properly before us on this appeal.

Fleischacker, 644 F.2d at 75 n.7.

The *Fleischacker* decision's failure to address these several additional controlling issues distinguishes it from the holding of the *en banc* opinion below. The *en banc* decision below expressly recognized the "serious practical

problems" confronting a civil deponent compelled to testify over his Fifth Amendment assertion merely because he has previously given similar testimony in a prior criminal proceeding under a grant of use immunity.

The *Franey* opinion, cited favorably as the "better reasoned" by the Seventh Circuit *en banc* panel, was rendered by the Fifth Circuit, which encompasses the trial court in which this multi-district litigation has been consolidated and to which all appeals from final judgments rendered have been and will be submitted. *Franey* and the *en banc* opinion below considered and rejected the holdings of *Starkey, Little Rock* and *Fleischacker* and are in full accord as to the controlling issues involved in this appeal and, thus, there exists no conflict as to the law of this case.

The Petitioners resort to a numerical comparison of judges involved in the foregoing cases involving similar issues in citing a "profound" conflict among the circuits. Petitioners' Brief, p. 13. Indeed, the assertion that the *en banc* decision below results in simply casting two circuits (Eighth and Second) against two others (Fifth and Seventh) is misleading. As indicated hereinabove, the *en banc* decision below is much more pervasive and encompassing than just another decision to be weighed in the balance of seemingly conflicting decisions.

It is thus clearly evident that a writ of certiorari is neither necessary nor prudent in this case. This Court has previously denied a petition for review by writ of certiorari of the *Franey decision. Adams Extract Co., et al.* v. *Franey*, 449 U.S. 1102, 66 L.Ed.2d 827, 101 S. Ct. 897 (1981). Now that the Seventh

Circuit *en banc* decision below has articulately addressed and thoroughly resolved whatever conflict existed among the circuits, there is no compelling need whatsoever for this Court to grant the instant Petition for a Writ of Certiorari.

II.

THE *EN BANC* DECISION HAS REAFFIRMED THIS COURT'S HOLDING IN *KASTIGAR V. UNITED STATES* THAT THE FEDERAL USE IMMUNITY STATUTE IS INTENDED TO PROVIDE PROTECTION COEXTENSIVE WITH THE FIFTH AMENDMENT.

Despite the Petitioners' representations to the contrary, the Seventh Circuit's *en banc* decision below is in complete accord with this Court's opinion in *Kastigar* v. *United States,* 406 U.S. 441 (1972). The *en banc* decision reinforces the holding in *Kastigar* "by examining the nature of the concept termed 'immunity.'" *En banc* Op. at 16a.

The *en banc* decision recognized that this Court established unequivocally in *Kastigar* that the privilege against self-incrimination may be asserted by a party or witness in a civil proceeding either at the stage of discovery or at trial and that in certain testimonial situations the privilege can be supplanted by a grant of immunity, pursuant to statute, which affords protection against self-incrimination coextensive with the Fifth Amendment privilege. *En banc* Op. at 16a; *Kastigar,* 406 U.S. at 444, 453; 18 U.S.C. §6001, *et seq.* The *en banc* opinion noted the erroneous reliance by the Eighth Circuit in *Starkey* upon an interpretation of *Kastigar* that would result in an improper expansion of the concept of "use immunity": "As the Court emphasized [in *Kastigar*] this coexten-

sive protection protects only the *source* not the *substance* of the information." *En banc* Op. at 16a.

Indeed, the *en banc* decision refers to and relies upon this Courts' holding in *Kastigar* which confirmed the constitutionality of the present use immunity statute. The *en banc* opinion quotes the statement by this Court that:

> While a grant of immunity must afford protection commensurate with that afforded by the privilege, *it need not be broader.* Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege.
>
> • • •
>
> The statute, like the Fifth Amendment, grants neither pardon nor amnesty. *Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.*
>
> • • •
>
> We conclude that the immunity provided by 18 U.S.C. §6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.

En banc Op. at 16-17a n.13, citing *Kastigar,* 406 U.S. at 453, 461-462 (emphasis added in *en banc* opinion).

The *en banc* panel also recognized the teaching of *Kastigar* that a grant of immunity provided a grand jury witness or trial witness under 18 U.S.C. §6002 affords no protection to any self-incriminating information disclosed by the witness on any other occasion prior or subsequent to the giving of the grand jury or trial testimony. *En banc* Op. at 17a. Each proceeding is distinct and in each case a witness has the right to claim the privilege or have it supplanted by a new grant of immunity. Clearly

then if a party or witness is denied a new grant of immunity, each subsequent testimonial statement which substantially repeats or acknowledges previous immunized testimony constitutes an independent source of evidence which may be used to support a subsequent criminal prosecution of that party or witness.

As the *en banc* decision further noted, the Eighth Circuit's (in *Starkey*) and Second Circuit's (in *Fleischacker*) interpretation of *Kastigar* improperly expanded the narrow *use* immunity afforded under 18 U.S.C. §6002 into a concept that would result in "conferring upon private civil litigants the power to effect a grant of broad *transactional* immunity by intentionally violating a witness' Fifth Amendment rights." *En Banc* Op. at 22a.

Contrary to Petitioners' contention, the *en banc* decision does not "read out" of the federal use immunity statute the protection against use of information "derived from" immunized testimony. Rather, the *en banc* opinion straightforwardly focuses upon the concept of "derivative use" of previously immunized testimony in explaining the erroneous expansion of that concept in both *Starkey* and *Fleischacker*. *En banc* Op. at 18-23a. The Seventh Circuit has reaffirmed the holding of *Kastigar* that the federal use immunity statute is intended to provide protection coextensive with the Fifth Amendment's protection against self-incrimination. It is not necessary for this Court to reiterate the Seventh Circuit's *en banc* analysis and holding and, therefore, review by writ of certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari currently pending before this Court should be denied.

Respectfully submitted,

MICHAEL W. COFFIELD
KEVIN M. FLYNN
ANDREW F. SEARS
COFFIELD UNGARETTI HARRIS & SLAVIN
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400
Attorneys for Respondent,
John A. Conboy

November 30, 1981

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION	)	
	)	MDL 310
THIS DOCUMENT RELATES TO ALL OPT-OUT CASES	)	

ORDER ADJUDGING JOHN A. CONBOY TO BE IN CIVIL CONTEMPT OF COURT

Opt out plaintiffs have made oral application pursuant to Title 28, § 1826, United States Code, for an order adjudging one John A. Conboy to be held in civil contempt of this court for his refusal, without lawful cause or excuse, to answer certain questions posed to him during the course of his oral deposition duly noticed and taken on Wednesday, May 20, 1981 in Chicago, Illinois. This court exercised the powers of a District Judge for the Seventh Circuit presiding over the taking of said deposition by telephone conference call pursuant to its discretion under Title 28, § 1407(b). The court presided rather than appoint a deposition judge because the matters to be examined are inextricably interwoven with the complex structure of this litigation as to make it extremely difficult for a judge unfamiliar with this case to preside. *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979), *In re Corrugated Container Antitrust Litigation, Appeal of*

Phillip Fleischacker, Trade Reg. Rep. (CCH) ¶63,867 (2nd Cir. 1981).

John A. Conboy is a non-party witness who appeared pursuant to a subpoena issued in the Northern District of Illinois for this deposition. Mr. Conboy, on advice of counsel, has consistently refused to answer deposition questions as to his possible participation in an alleged price-fixing conspiracy in the corrugated container industry on the grounds that such answers might tend to incriminate him. John A. Conboy had been an employee of Weyerhaeuser Corporation prior to December 21, 1975, the period in question. He is presently employed by Banner Personnel in Chicago, Illinois.

Mr. Conboy submitted to an interview by the Department of Justice in connection with a grand jury investigation of the corrugated industry. In connection with this interview, he was given a letter grant of immunity. Mr. Conboy also testified before the grand jury and this testimony was given subject to an oral grant of immunity read into the record. This grand jury investigation of the corrugated industry concluded with indictments in January of 1978. Clearly, Mr. Conboy cannot be prosecuted in either state or federal courts using the testimony thus elicited. *Kastigar* v. *United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

The federal statute of limitations is four years which indicates that Mr. Conboy would not be subject to federal prosecution for the period before December 31, 1975. Counsel for John A. Conboy stated that Mr. Conboy may be subject to prosecution in Ohio where there exists no applicable statute of limitations for antitrust violations. The court questioned Mr. Conboy as to whether he knew

of any pending litigation related to the corrugated industry in the state of Ohio. Mr. Conboy answered that he has not been contacted to testify nor does he know of any such litigation in Ohio. Counsel for John A. Conboy did not present proof that any other applicable statute of limitations had not run.

The questions asked in said deposition were taken directly from certain interview transcripts of Mr. Conboy's testimony. Even after being compelled to answer said deposition questions by this court, Mr. Conboy has asserted his fifth amendment right and refused to answer.

THEREFORE, John A. Conboy having knowingly and willfully refused to obey said order which was made in the presence of said John A. Conboy and his counsel while this court presided over said deposition through a telephone conference call on May 20, 1981, and good cause appearing therefor,

IT IS HEREBY ORDERED ADJUDGED, and DECREED that said John A. Conboy shall be and hereby is found and determined to be in civil contempt of this court, under and pursuant to the provisions of Title 28, § 1826, United States Code, and the Federal Rules of Civil Procedure, and that said John A. Conboy shall be and hereby is fined $5,000, and ordered to be remanded forthwith to the custody of the Attorney General of the United States to be confined at a suitable place for a period of six (6) months, or until such time that said John A. Conboy is willing to testify and answer the questions which this court has ordered him to answer, whichever period may be shorter; provided, however, that the period of such confinement of the said John A. Conboy shall not exceed the life of the above entitled litigation.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, and DECREED that this order shall be stayed until 5:00 P.M. CST, June 3, 1981, and shall expire at that time unless said John A. Conboy shall have theretofore filed a notice of appeal from this order to the United States Court of Appeals, and shall expeditiously pursue it to completion, and in the event such notice of appeal is so filed, this stay shall be continued pending such appeal to the date that said court of appeals files its order or judgment respecting such appeal at which time this stay shall expire.

Done at Houston, Texas, this 25th day of May, 1981.

/s/ _____

UNITED STATES DISTRICT JUDGE

Petitioner's Reply Brief

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No. 81-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PILLSBURY COMPANY, ET AL.,
OPT-OUT PLAINTIFFS,

Petitioners,

vs.

JOHN A. CONBOY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

FRANCIS J. McCONNELL
135 S. LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131

Attorney for Petitioners

December 8, 1981

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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REPLY BRIEF OF PETITIONERS

I.

The conflict among the Circuits is real. As a reading of the contrary decisions demonstrate, and as the *en banc* majority acknowledges, "[t]here is a conflict of opinion among the Circuits on [the] question [whether] . . . answers to verbatim questions from prior immunized testimony [are] protected by the original immunity grant." *En banc* Op. at 15a (cited in Brief of Respondent in Opposition at 8). The fact that the Seventh Circuit

was the last court to consider the question and sided with the Fifth Circuit, rather than the Eighth and Second Circuits and the earlier panel decision in the Seventh Circuit, does not resolve the conflict. If anything, the *en banc* opinion has intensified the conflict. To suggest that this latest expression of diametrically opposing views somehow "has resolved whatever conflict may have existed among the circuits on this broad issue" is to ignore the contrary holdings in *Starkey* and *Fleischacker*. More importantly, it attempts to arrogate to the Seventh Circuit, powers possessed only by the Supreme Court.

Respondent's other argument that, because the *en banc* opinion relies on additional grounds not considered by the other Circuits, no conflict among the Circuits exists, is equally disingenuous. Respondent cites three additional grounds allegedly not considered by either the *Starkey* or *Fleischacker* courts. First, it is claimed the Second Circuit in *Fleischacker* did not reach the question of whether the witness' civil deposition testimony could subject him to prosecution for perjury. To the contrary, the Second Circuit, citing *United States v. Housand*, 550 F.2d 818 (2d Cir. 1977), recognized that a witness is entitled to claim the Fifth Amendment privilege if his testimony might reveal perjury in a prior proceeding. The court noted, however, that the witness in *Fleischacker* never claimed before to the District Court that the incrimination he feared related to perjury in prior testimony. The court, therefore, held that the point was not properly before it on appeal, *In Re Corrugated Container Antitrust Litigation, Appeal of Phillip Fleischacker*, 644 F.2d 70, 75 n.7 (2d Cir. 1981). Similarly, in the case below, there was no claim before District Judge Singleton or before the Seventh Circuit that Conboy's Grand Jury testimony was other than truthful. Hence, the

perjury issue provides no additional support for the *en banc* majority's holding.

Respondent next argues that the Eighth and Second Circuits did not address the issue of whether the deponent faces a risk of waiver should he stray beyond the four corners of his earlier immunized testimony. Again, to the contrary, the Second Circuit, in *Fleischaker*, addressed this issue, holding that "responsive" answers to questions closely tracking or taken verbatim from the Grand Jury testimony are protected. As the *Fleischacker* court noted, where the examiner has access to the Grand Jury transcript, "the task is simple: answers to such questions clearly would be derived from immunized testimony." *Id.* at 79 n.14. In the case at bar, the examiner, Conboy, and his counsel had a copy of the Grand Jury transcript at the deposition. There was no risk of inadvertent waiver. The issue of waiver arises only if Conboy were to volunteer incriminating testimony which was not responsive to the question asked. Manifestly, such voluntary testimony would not be compelled testimony under Judge Singleton's order.

The *en banc* majority raises, but does not decide, an issue not addressed by the other Circuits. The court suggests that Conboy's Grand Jury testimony may be admissible under Rule 804 of the Federal Rules of Evidence, thus rendering unnecessary the District Court's order compelling Conboy's testimony. This argument, however, does not address the basic question of whether Conboy's civil deposition testimony is protected as derived information. If it is protected, petitioners are entitled to it regardless of whether Conboy's Grand Jury transcript is otherwise admissible. Moreover, as Chief Judge Cummings notes in the panel opinion below, "plaintiffs are entitled to this testimony because as

[Judge Sprecher] acknowledges the vagaries of evidentiary rulings might otherwise prevent its admission at the coming trial." Panel Opinion at 37a.

Finally, respondent argues that while the Second Circuit addressed the issue of *de facto* immunity, it did not resolve it. Respondent is mistaken. The Second Circuit observed that there only would be a problem of *de facto* immunity if the witness were compelled to give incriminating testimony beyond the scope of the immunized Grand Jury testimony and, accordingly, the court limited Mr. Fleischacker's examination to matters "touched upon" before the Grand Jury. With this limitation imposed, the Second Circuit found: "We are satisfied that compelling a witness to answer questions a second time that were previously answered under a grant of immunity does not result in an expansion of the original grant of immunity. Rather, such responses would come within the original statutory immunity grant because, by necessity, they would derive from the original immunized testimony. Thus no *de facto* grant of immunity will have occurred." *Id.* at 78.

II.

Respondent urges that the decision below does not conflict in principle with *Kastigar v. United States*, 406 U.S. 441 (1972) because the *en banc* majority correctly determined that the Grand Jury immunity protection does not extend to Conboy's subsequent deposition testimony and, therefore, does not provide protection coextensive with Conboy's Fifth Amendment privilege. This is the very circular reasoning criticized by Chief Judge Cummings in his dissenting opinion:

> The method of the *en banc* majority is first to read the use immunity statute to afford only parlous and

> nugatory protection and then, of necessity, to find such protection an inadequate substitute for Fifth Amendment rights. *En Banc* Op. at 29a.

This narrow reading of the scope of protection provided by the use immunity statute conflicts with this Court's determination in *Kastigar* that the statute provides "a sweeping proscription of use, direct or indirect, of the compelled testimony." 406 U.S. at 460.

CONCLUSION

For the reasons stated in the Petition and this Reply, this Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

FRANCIS J. McCONNELL
135 S. LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131

Attorney for Petitioners

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Petitioner's Brief

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BRIEF FOR THE PETITIONERS

FRANCIS J. MCCONNELL
(Counsel of Record)
EDWARD F. RUBERRY
WILLIAM R. JANSEN
ROBERT A. OLENDER
MIGUEL F. UGARTE
135 South LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131

Attorneys for the Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether, under the use immunity statute, a deponent's civil deposition testimony, which repeats verbatim or closely tracks his prior immunized testimony, is "information directly or indirectly derived from such [immunized] testimony or other information" and is therefore unavailable for use against him in any subsequent criminal prosecution?

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BRIEF FOR THE PETITIONERS

CITATIONS TO OPINIONS BELOW

The *en banc* opinion of the Court of Appeals, *In re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 661 F.2d 1145 (7th Cir. 1981) is printed in Appendix A to Petition for Writ of Certiorari (hereinafter "Petition") pp. 1a-30a. The panel opinion of the Court of Appeals, *In re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 655 F.2d 748 (7th Cir. 1981) is printed in Appendix A to Petition, pp. a-67a. The District Court Memorandum Opinion, *In re Corrugated Container Antitrust Litigation, Order Adjudging John A. Conboy to be in Civil Contempt of Court*, MDL 310 (S.D. Tex. May 26, 1981) is printed in Appendix A to Petition, pp. 68a-70a.

JURISDICTION

The panel opinion was entered July 17, 1981. Conboy's petition for rehearing *en banc* was granted September 2, 1981. The *en banc* opinion of the Court of Appeals was entered on October 16, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution, U.S. CONST. amend. V, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutory provisions involved are Sections 6001, 6002, and 6003 of the immunity statute, 18 U.S.C. §§6001-6005 (1976). The statute is printed in Appendix B to the Petition, pp. 72a-76a. Section 6002 provides, in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information . . . to—
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> (1) a court or grand jury of the United States, . . .
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> and the person presiding over the proceedings communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT OF THE CASE

John A. Conboy is a former executive of the Weyerhaeuser Company, a defendant in the Corrugated Container Antitrust Litigation, MDL 310. He was compelled to testify, pursuant to a grant of immunity, before a grand jury investigating price-fixing activities occurring in the corrugated container industry. That investigation culminated in 1978 with the indictment of fourteen companies and twenty-six individuals.[1]

Following the criminal indictments, numerous civil antitrust actions were filed in various United States district courts. Those actions were consolidated for dis-

[1] *See generally In re Corrugated Container Antitrust Litigation*, 659 F.2d 1322 (5th Cir. 1981); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981).

covery, pursuant to 28 U.S.C. §1407(a) (1976), in the Southern District of Texas before Chief Judge John V. Singleton, Jr. Petitioners here are purchasers of corrugated containers who elected to opt-out of the class action proceedings and pursue their own causes of action against the container manufacturers.

On January 10, 1978, Conboy was interviewed by Department of Justice attorneys concerning his participation in and knowledge of the corrugated container price-fixing conspiracy. That interview was conducted pursuant to a letter promise of immunity.[2]

Subsequently, on January 16, 1978, Conboy appeared before the Grand Jury, and, pursuant to 18 U.S.C. §6001-6003 (1976), was granted formal use immunity for his testimony. See Joint Appendix, p. 15. Conboy then testified before the Grand Jury, restating and expanding upon his interview testimony.

In January, 1980, Judge Singleton, upon motion and a showing of compelling and particularized need, ordered that portions of the immunized government interview statements and Grand Jury testimony of certain witnesses be produced to attorneys for the class and opt-outs. Included in the materials covered by this Order were parts of Conboy's interview and Grand Jury transcripts.[3]

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[2] The letter stated that:

> The information which you reveal in the course of the interview and the transcript derived therefrom, along with the personal documents which you deliver to us, will be given the same treatment and protections afforded statements made before a grand jury pursuant to a court order compelling testimony and granting immunity.

Joint Appendix, pp. 13-14.

[3] The Memorandum and Order of January 25, 1980 states, in part:

(Footnote continued on following page)

Pursuant to a subpoena issued by the United States District Court for the Northern District of Illinois, Conboy appeared in Chicago for deposition on May 20, 1981. Counsel for petitioners, Conboy, and counsel for Conboy had copies of his immunized testimony at the deposition. The transcripts were marked as deposition exhibits so that all could follow the intended examination. Conboy was asked questions taken verbatim from, or closely tracking, the questions and answers contained in the transcripts of his immunized testimony. He refused to answer each question, claiming a Fifth Amendment privilege against self-incrimination.[4]

Counsel for petitioners then moved Judge Singleton to compel Conboy to answer the questions. After hearing argument of counsel and personally questioning Conboy, Judge Singleton, expressly exercising the powers of

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[3] *continued*

The transcripts and interview statements ordered disclosed may be used in depositions and at trial for purposes of impeaching witnesses, refreshing their memory, testing their credibility and the like. Use of portions of these transcripts as substantive evidence in the civil trial will be subject to later evidentiary rulings by the Court.

[4] The questioning fell into the following pattern: a question was asked from the transcript; then it was rephrased to include the transcript answer (i.e., '[i]s it not the fact that . . .'); finally, Conboy was asked if he had 'so testified' in his immunized interview and Grand Jury examination. An example of this three-question pattern is as follows:

Q. Who did you have price communications with at Alton Box Board?

. . . .

Q. Is it not the fact that you had price communications with Fred Renshaw and Dick Hermans . . . at Alton Box Board?

. . . .

Q. Did you not so testify in your government interview statement of January 10, 1978?

Joint Appendix pp. 29-31.

the District Court for the Northern District of Illinois pursuant to 28 U.S.C. §1407(b) (1976), ordered Conboy to answer the questions. When Conboy continued to claim a Fifth Amendment privilege, the district judge held him in contempt, but stayed the operation of the Order pending appeal. Appendix A to Petition, pp. 68a-70a.

An expedited appeal followed under the provisions of the Recalcitrant Witness Statute, 28 U.S.C. §1826 (1976).[5] The Seventh Circuit panel majority (Senior Judge Swygert joined by Chief Judge Cummings) affirmed the order of contempt, holding that "[b]ecause the questions asked in this deposition were taken verbatim from or closely tracked the transcript of Conboy's grand jury testimony, we believe that his answers at the deposition would be 'derived from' the prior immunized testimony and therefore unavailable for use in any subsequent criminal prosecution." *In Re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 655 F.2d 748, 751 (7th Cir.), *rev'd en banc*, 661 F.2d 1145 (7th Cir. 1981). Judge Sprecher dissented.

Conboy petitioned for rehearing *en banc*. On September 2, 1981 the petition was granted.[6] In a four to one opinion, the *en banc* majority adopted and republished Judge Sprecher's opinion dissenting from the panel decision as the *en banc* majority opinion. *In Re*

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[5] 28 U.S.C. §1826(b) (1976) provides, in pertinent part: "Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

[6] Judge Swygert did not participate in the order granting rehearing *en banc*, or the subsequent *en banc* opinion. Judge Cudahy disqualified himself from participating in the petition for rehearing and the rehearing.

Corrugated Container Antitrust Litigation, Appeal of John Conboy, 661 F.2d 1145 (7th Cir. 1981).

The *en banc* majority first determined that Conboy's claimed fear of prosecution was more than "fanciful" because of the admittedly incriminating nature of the testimony sought and the fact that all applicable statutes of limitations had not run.[7] The court concluded that Conboy was therefore entitled to assert his Fifth Amendment privilege unless his deposition testimony was protected from use against him in a subsequent criminal action.[8]

The *en banc* majority next held that under the use immunity statute, 18 U.S.C. §6002, absent a separate and independent grant of immunity,[9] a deponent's civil deposition testimony which repeats verbatim or closely tracks his prior immunized testimony is not protected. While acknowledging that verbatim questions taken from the prior immunized testimony "of course [would be] so derived" from the immunized testimony, the *en banc* majority reasoned that answers to such questions are "derived from the deponent's *current*, independent memory of events" and thus constitute "a *new* source of evidence" which could be used in a criminal prosecution. 661 F.2d at 1155.

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[7] The Court placed principal emphasis on Ohio where there is no statute of limitations for prosecutions of violations of the Ohio antitrust laws. OHIO REV. CODE ANN. §1331.12 (Page).

[8] The holding of the panel majority made it unnecessary to consider the question of likelihood of prosecution since it found no use could be made of Conboy's testimony in any event. Judge Cummings, however, noted that any possibility of Conboy's prosecution by Federal or Ohio authorities was "fanciful". 655 F.2d at 752 n.4.

[9] The United States Attorney in the instant actions declined to authorize immunity grants in connection with civil depositions.

Chief Judge Cummings, dissenting, characterized the *en banc* majority's "question/answer" dichotomy as "an arid distinction rest[ing] on an unduly restrictive reading of the statutory language and on a misconception about the effect of repetition of testimony." 661 F.2d at 1159. Judge Cummings explained how the panel majority would have treated Conboy's answers as derived from his immunized testimony:

> The panel majority would have treated Mr. Conboy's answers as falling within the category of 'information directly or indirectly derived' from his immune testimony, where the questions were asked so as to afford Mr. Conboy the choice of (1) repeating his original immunized answer, (2) adopting his immunized answer when it was repeated to him, or (3) affirming that the transcript of his immunized answer was his prior testimony.

661 F.2d at 1160.

SUMMARY OF ARGUMENT

1. The immunity statute, 18 U.S.C. §§6001-6005, provides protection coextensive with the Fifth Amendment privilege and precludes any direct or derivative use of the compelled testimony in a subsequent criminal prosecution of the witness.

2. Where the deposition questions are taken verbatim from or closely track immunized testimony, responsive answers to such questions are necessarily derived from the immunized testimony and thus protected from use.

3. The district court's Order compelling Conboy to testify over Fifth Amendment assertions did not rely on

the exclusionary rule and did not amount to a grant of *de facto* immunity; rather that court, as well as the panel majority, determined that Conboy had no Fifth Amendment privilege to assert because of the coextensive protection provided by the immunity statute. In making this determination, both courts properly exercised their judicial authority to interpret the scope of protection provided by the immunity statute.

4. Conboy has no legitimate perjury or waiver concerns. Innocent deviations from prior immunized testimony do not constitute perjury. Moreover, Conboy has never claimed before the district court, nor subsequently, that his deposition testimony would reveal perjury in his immunized testimony; to the contrary, the claim was that the truthful immunized testimony was incriminating and any repetition of it would subject him to possible prosecution. Further, there is no risk of inadvertent waiver of Fifth Amendment rights. The witness and his attorney had copies of the immunized testimony and the examination was confined to the four corners of that testimony.

5. Because the deposition testimony is derived from the immunized testimony and statutorily protected, petitioners are entitled to introduce that testimony at trial regardless of whether or not the Grand Jury transcripts are subsequently determined to be admissible under Rule 804 of the Federal Rules of Evidence.

ARGUMENT

I

THE HOLDING OF THE *EN BANC* MAJORITY BELOW AS TO THE SCOPE OF PROTECTION AFFORDED BY THE IMMUNITY STATUTE CONFLICTS WITH THIS COURT'S HOLDING IN *KASTIGAR v. UNITED STATES*.

A. The Immunity Statute, In Proscribing Any Use Or Derivative Use Of Compelled Testimony, Affords Protection Co-Extensive With And Supplants The Fifth Amendment Privilege.

In October, 1970 Congress passed the Organized Crime Control Act of 1970. Pub. L. 91-452, 84 Stat. 922. Title II of this act provides for "use" immunity, rather than the heretofore standard, "transactional" immunity. This change was promulgated to provide immunity which extends no further than that necessary under the strictures of the Fifth Amendment.

> It is contemplated that the title will enable effective displacement of the privilege against self-incrimination by granting protection co-extensive with the privilege; that is, protection against the use of compelled testimony directly or indirectly against the witness, in a criminal proceeding.

H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970). The language of the statute was specifically tailored to the recommendations of the National Commission on Reform of Federal Criminal Laws. (Second Interim Report of the National Commission on Reform of Federal Criminal Laws, March 17, 1969, Working Papers of the Commission, 1446 (1970)). Congress recognized that an immunity grant is proper only if it provides protection co-extensive with that of the Fifth Amendment. Representative Poff, the bill's chief sponsor in the House, quoted Mr. Justice White's observation in

Murphy v. Waterfront Commission, 378 U.S. 52, 107 (1964), that "[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination." 116 CONG. REC. 35291. Hence, the statute was designed to be as broad as a witness' Fifth Amendment privilege.

The constitutionality of the use immunity portion of the Organized Crime Control Act of 1970, 18 U.S.C. §§6001-6005 (1976), was first considered by this Court in *Kastigar v. United States*, 406 U.S. 441 (1972). In *Kastigar*, this Court determined that, for the Fifth Amendment privilege to be supplanted and a witness ordered to testify under a grant of immunity, that grant must be co-extensive with the privilege. In upholding the constitutionality of the statute, this Court was satisfied that the language of §6002 provided such broad and co-extensive protection and thus "removed the dangers against which the privilege protects," 406 U.S. at 449.

> The statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.

406 U.S. at 453.

In rejecting the argument that use and derivative use immunity would not adequately protect a witness from various possibly incriminating uses of the compelled testimony, this Court observed that the statute, "provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information

derived therefrom ... ." 406 U.S. at 460. The Court added that the statute, "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460.

The explicit prohibition on indirect or derivative use of compelled testimony was deemed essential to the constitutionality of the statute. Otherwise, it would not have afforded protection co-extensive with the Fifth Amendment privilege it was supplanting. This was the basis for distinguishing the Court's earlier decision in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), which invalidated the immunity statute of 1868. Thus, in *Kastigar*, this Court observed:

> Since the revised 1868 Act, as construed by the Court, would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him. Accordingly, under the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege, the witness' refusal to testify was held proper.
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> The *Counselman* statute, as construed by the Court, was plainly deficient in its failure to prohibit the use against the immunized witness of evidence derived from his compelled testimony.

406 U.S. at 450, 453-54 (footnotes omitted).

In holding that answers to verbatim questions from prior immunized testimony are not protected by the original immunity grant, the *en banc* majority has read

out of the statute the proscription on derivative use which this Court deemed quintessential in *Kastigar*. Indeed, as Chief Judge Cummings pointed out in his dissent:

> The method of the *en banc* majority is first to read the use immunity statute to afford only parlous and nugatory protection and then, of necessity, to find such protection an inadequate substitute for Fifth Amendment rights.

661 F.2d at 1160-61.

B. Answers To Questions Which Repeat Verbatim Or Closely Track A Deponent's Immunized Testimony Are Necessarily Derived From Such Testimony And Are Therefore Protected.

Section 6002 provides, in relevant part:

> [N]o testimony or other information compelled under the order (*or any information directly or indirectly derived from such testimony or other information*) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. §6002 (emphasis added).

The *en banc* opinion interprets §6002 to deny protection to answers to questions taken verbatim from immunized testimony. While the *en banc* majority found that the questions asked of Conboy were information directly or indirectly derived from his immunized testimony, the court declined to accord this status to answers given in response to those "protected" questions. 661 F.2d at 1155. According to the *en banc* majority, *any* response, including mere acknowledgement by Conboy that the transcribed Grand Jury answers were his testimony, would constitute "a *new* source of evidence", available for use against him in a subsequent

prosecution. 661 F.2d at 1155. Thus, the *en banc* majority states:

> The answers, unlike the questions, are not 'directly or indirectly derived' from the immunized grand jury or interview transcripts. Rather the answers are derived from the deponent's *current*, independent memory of events.

661 F.2d at 1155.

Judge Cummings' dissent characterized this unreasoned distinction as "metaphysical":

> No explanation is offered for giving the general word 'information' in Section 6002 such a particularized meaning, but there seems to be an almost metaphysical notion that the mere repetition or acknowledgement by Mr. Conboy of his earlier testimony constitutes new and independent evidence.

661 F.2d at 1160.

The decision of the court below, and the decision of the Fifth Circuit in *In Re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086 (5th Cir. 1980), directly conflict with the decision of the Second Circuit in *In Re Corrugated Container Antitrust Litigation, Appeal of Philip Fleischacker*, 644 F.2d 70 (2d Cir. 1981), and the decisions of the Eighth Circuit in *In Re Order of Civil Contempt, Appeal of Carlos Lee Starkey*, 600 F.2d 1043 (8th Cir. 1979), and *Little Rock School District v. Borden, Inc.*, 632 F.2d 700 (8th Cir. 1980). The *en banc* majority so acknowledged:

> There is a conflict of opinion among the circuits on this question. In *Franey*, the Fifth Circuit held that answers to verbatim questions from prior immunized testimony were not protected by the original immunity grant. But in [*Fleischacker* and *Starkey*], the Second and Eighth Circuits held that such answers were protected.

661 F.2d at 1153.

The Eighth Circuit in *Starkey* was the first to consider the question. That court held that as long as the deposition questions were confined to "the same time, geographical and substantive framework as the [immunized] grand jury testimony" the witness' testimony was protected and, therefore, he had no Fifth Amendment privilege to assert. 600 F.2d at 1048. The court stated that the deponent "clearly has immunity from criminal prosecution for the [civil] deposition testimony because such testimony would be tainted by the federal grand jury testimony for which [he] received 'use immunity' pursuant to 18 U.S.C. §6001 *et seq.*" 600 F.2d at 1046. The court concluded that the "obvious dependence on the [immunized] testimony in the deposition questions" would leave the deposition testimony "tainted and unavailable for criminal prosecution of Starkey." 600 F.2d at 1047. *Starkey* was reaffirmed in *Little Rock School District v. Borden, Inc.*, 632 F.2d 700 (8th Cir. 1980).

The Fifth Circuit in *Franey* next considered the question. In a two to one decision the court reached the opposite result. The *Franey* majority held that the district court's (Singleton, J.) determination that the civil deposition testimony would be "derived from" immunized testimony and, therefore, "tainted" and inadmissible in any future prosecution, amounted to a judicial grant of immunity contrary to 18 U.S.C. §6003 (1976). The majority further reasoned that the district judge lacked authority to prospectively determine that the civil deposition testimony would be barred as derived information.

Dissenting, Judge Frank M. Johnson observed:

> There is no question but that the majority opinion is correct that it is beyond the authority of a district judge unilaterally to grant immunity to compel deposition testimony. *See* 18 U.S.C. §6003 [citations

> omitted]. However, a grant of immunity under 18 U.S.C. §6001 *et seq.* such as that received by appellants for their grand jury testimony covers any information 'directly or indirectly derived' from the immunized testimony.
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> It is my judgment that any prosecutorial use of the deposition testimony required by the district judge would, without any question, be barred as derivative of the compelled evidence.

620 F.2d at 1095.

Judge Johnson emphasized that it has always been the province of the judiciary to determine the scope of protection provided by immunity statutes and to determine whether an assertion of the Fifth Amendment privilege is proper. He noted that just such a determination had been made by the Seventh Circuit in *Patrick v. United States*, 524 F.2d 1109 (7th Cir. 1975).

Within several months of *Franey*, the Second Circuit handed down its decision in *Fleischacker*. In the very same litigation, an opposite result was reached. Fleischacker, like Conboy, is a former employee of a defendant in this litigation who provided immunized testimony concerning his involvement in and awareness of the corrugated price-fixing conspiracy. That immunized testimony was later made available to the petitioners. At deposition, Fleischacker was initially asked many questions taken verbatim from the transcripts. Other questions had minor language substitutions and changes. Fleischacker refused to answer all substantive questions, invoking the Fifth Amendment. Judge Singleton, exercising the power under 28 U.S.C. §1407(b) of the District Court for the Southern District of New York, where Fleischacker resided, ordered Fleischacker to answer those questions. Upon Fleischacker's continued refusal

to answer, Judge Singleton held him in contempt. Fleischacker appealed.[10]

The Second Circuit affirmed the contempt order: "[w]e agree with the Eighth Circuit and hold that where a transcript of a witness' immunized testimony constitutes the source of questions posed to the same witness in a civil proceeding, responsive answers to such questions are necessarily 'derived from' the immunized testimony, and thus unavailable for subsequent prosecutorial use." 644 F.2d at 77. The Second Circuit explicitly rejected the *Franey* majority's reasoning, embracing instead Judge Frank Johnson's dissent:

> In deciding whether to uphold a witness' assertion of the self-incrimination privilege in cases such as this, the district judge need only determine whether prior immunized testimony has served as the source of the questions being asked. *If so, any responsive answer by the witness to such questions necessarily will 'derive from' the immunized testimony* and thus be unavailable for future use against the witness in a criminal prosecution.

644 F.2d at 78 (emphasis added).

This was the state of the conflict before *Conboy*. The panel majority, relying on the Second Circuit decision in *Fleischacker* and the Eighth Circuit decision in *Starkey*, held Conboy's civil deposition testimony protected from use against him because it would be derived from the immunized testimony.

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[10] Fleischacker simultaneously appealed to both the Fifth and Second Circuits. The Fifth Circuit in *Franey* rejected jurisdiction over Fleischacker's appeal, returning his case to the Second Circuit, where his deposition had taken place. 620 F.2d at 1090-91. Deferring to the jurisdictional determination of the Fifth Circuit, the Second Circuit found that it had a sufficient jurisdictional basis under 28 U.S.C. §1294 (1976) to hear Fleischacker's appeal. 644 F.2d at 74 n.6.

Judge Sprecher, dissenting, urged that the answers, unlike the questions, would not be derived from the immunized testimony because they would be based on the witness's current recollection. Upon rehearing, Judge Sprecher's dissent was adopted and republished as the opinion of the *en banc* majority. That opinion draws the following distinction between the derivative nature of the questions and answers.

> The answers, unlike the questions, are not 'directly or indirectly derived' from the immunized grand jury or interview transcripts. Rather the answers are derived from the deponent's *current*, independent memory of events.
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> * * *
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> If Conboy answers the proposed questions, those answers necessarily create a *new* source of evidence. The new answers could then be used by a prosecutor because those specific answers were not derived from the previously immunized testimony—even though the questions, of course, were so derived.

661 F.2d at 1155.

There is simply no basis in logic or law for this metaphysical distinction between questions derived from immunized testimony and answers responsive to those same questions.[11] An answer by its very nature is evoked by and responds to information contained in the question. Where the immunized testimony serves as the source of the questions asked, responsive answers to such questions, necessarily will "derive from" the immunized testimony, as the panel majority and the Second

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[11] As Judge Cummings notes in dissent, the cases relied on by the *en banc* majority are clearly inapposite: "In no case cited in the *en banc* majority's discussion . . . does a witness who had been granted immunity in one proceeding forfeit it simply by testifying in another proceeding." 661 F.2d at 1160.

Circuit in *Fleischacker* correctly held. As Chief Judge Cummings points out in dissent, the panel majority would have treated Conboy's answers as "information directly or indirectly derived" from his immunized testimony, "where the questions were asked so as to afford Mr. Conboy the choice of (1) repeating his originally immunized answer, (2) adopting his immunized answer when it was repeated to him, or (3) affirming that the transcript of his immunized answer was his prior testimony." 661 F.2d at 1160. In these circumstances, necessarily, *both* the questions and answers would be derived from the compelled testimony. Therefore, they are equally protected from use in a subsequent criminal prosecution. The plain language of §6002 and *Kastigar* mandate this conclusion.

II

THE ORDER OF THE DISTRICT COURT COMPELLING CONBOY TO TESTIFY DID NOT CONSTITUTE A GRANT OF *DE FACTO* IMMUNITY NOR IMPINGE ON CONBOY'S FIFTH AMENDMENT RIGHTS.

A. Conboy's Protection Derives From The Original Immunity Grant.

The *en banc* majority, as further grounds for its holding, reasoned that a present determination that Conboy's deposition testimony would be barred as derived from his compelled immunized testimony would amount to an impermissible grant of *de facto* immunity. 661 F.2d at 1155-57. The complete answer to this argument is that the witness's protection derives from the *original* statutory immunity grant, not a second, unauthorized judicial grant.

While it is true that the immunity statute specifically restricts the authority to initiate an immunity order to United States Attorneys, with the approval of the Attorney General, it has always been for the courts to

determine whether an assertion of the privilege is proper and to decide the question of taint or whether evidence should be excluded as derivative of immunized testimony. *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972); *Kastigar v. United States*, 406 U.S. 441, 460 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Franey*, 620 F.2d at 1095 (Johnson, J., dissenting). This was the very determination made by Judge Singleton in ordering Conboy to testify and in holding him in contempt:

> Mr. Conboy submitted to an interview by the Department of Justice in connection with a grand jury investigation of the corrugated industry. In connection with this interview, he was given a letter grant of immunity. Mr. Conboy also testified before the grand jury and this testimony was given subject to an oral grant of immunity read into the record. This grand jury investigation of the corrugated industry concluded with indictments in January of 1978. *Clearly, Mr. Conboy cannot be prosecuted in either state or federal courts using the testimony thus elicited. Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).
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> * * *
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> *The questions asked in said deposition were taken directly from certain interview transcripts of Mr. Conboy's testimony.*

Order Adjudging Conboy in Contempt, Appendix A to Petition, p. 69a (emphasis added).

The Second Circuit in *Fleischacker* addressed the *de facto* immunity issue. Rejecting the Fifth Circuit's formulation in *Franey* and embracing the *Franey* dissent, the court concluded that compelling a witness to answer questions that were previously answered under a grant

of immunity would not result in an expansion of the original immunity grant:

> Moreover, we do not agree that compelling a previously immunized witness to testify over an assertion of his privilege will result in a proliferation of *de facto* grants of immunity. We are satisfied that compelling a witness to answer questions a second time that were previously answered under a grant of immunity does not result in an expansion of the original grant of immunity. Rather, such responses would come within the original statutory immunity grant because, by necessity, they would derive from the original immunized testimony. Thus no *de facto* grant of immunity will have occurred.

644 F.2d at 78.

The panel majority likewise rejected the notion that Judge Singleton's Order amounted to an improper *de facto* grant of immunity. The panel observed that it and the district court were merely interpreting the scope of the prior immunity grant:

> It is well established that a Court, although it may not grant immunity to a witness, may interpret the scope of a grant of immunity. *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964); *Kastigar*, *supra*, 406 U.S. at 453; *Fleischacker*, *supra*, 644 F.2d at 78; *Starkey*, *supra*, 600 F.2d at 1048. In the case at bar, we must determine if Conboy's testimony at the deposition would be immunized in order to rule on the propriety of his assertion of the Fifth Amendment privilege. In holding that his deposition testimony could not be used against him in a subsequent criminal prosecution because it would be derived from his previous immunized testimony, we are merely interpreting the scope of that grant of immunity.

Conboy, 655 F.2d at 753 (Panel Opinion).

The panel majority's conclusion that answers to verbatim questions from immunized testimony are protected as derivative of the compelled testimony did not rely on the exclusionary rule. That rule is solely remedial and operates to exclude evidence wrongfully compelled over a valid assertion of privilege. The panel majority did not hold that regardless of the propriety of Conboy's claim of privilege the deposition testimony must be excluded under the exclusionary rule. Rather, it concluded that Conboy had no privilege to assert because his testimony was protected under the statute. 655 F.2d at 752 n.5.

Moreover, such a prospective determination of taint does not exceed judicial authority. As the panel majority and the *Franey* dissent point out, just such a prospective determination was made in *Patrick v. United States*, 524 F.2d 1109, 1120 (7th Cir. 1975). In *Patrick*, a taxpayer challenged a jeopardy assessment which was based on information given by the taxpayer in his immunized testimony before a grand jury. The taxpayer argued that, in a refund suit, he would have to testify about matters covered by his prior immunized testimony. He feared that this testimony would constitute an independent source upon which a criminal suit could be brought. The Seventh Circuit held otherwise. Writing for the panel, Judge, now Justice, Stevens reasoned that the taxpayer's testimony in the refund suit "would be elicited only because the government could use the grand jury testimony as a basis for the assessment." 524 F.2d at 1120. Therefore, the testimony in the refund proceeding could not be used against the taxpayer in any criminal action because it would be "information . . . indirectly derived from immunized testimony". 524 F.2d at 1120.

Finally, the *en banc* majority's concern that another court in a subsequent prosecution of Conboy may not agree with the district court's reasoning as to the derivative nature of Conboy's deposition testimony will be mooted by this Court's decision. Obviously, if this Court determines that a deponent's testimony which repeats verbatim or closely tracks his prior immunized testimony cannot be used against him in a subsequent prosecution, such determination will end any possibility of inconsistent rulings and bind all courts.

B. The *En Banc* Majority's Perjury And Waiver Concerns Are Misplaced.

The *en banc* majority suggests Conboy could be subject to a prosecution for perjury or giving false statements if his deposition answers are inconsistent with his earlier government interview or Grand Jury transcripts.

Section 6002 expressly excepts from the scope of protection perjured testimony or the giving of false statements, providing that the compelled testimony, or any information derived from such testimony, may not be used against the witness in any criminal case "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." As this Court held in *United States v. Apfelbaum*, 445 U.S. 115, 123 (1980), not only can a witness be prosecuted for perjury in his prior immunized testimony, but the entire immunized testimony, both truthful and false, may be introduced in the subsequent perjury trial. A witness is entitled to claim the Fifth Amendment privilege if his testimony in a later proceeding might reveal perjury in a prior proceeding, as both the panel majority, 655 F.2d at 753 n.6, and the Second Circuit in *Fleischacker* acknowledged, 644 F.2d at 75 n.7. Conboy's concern that his testimony may innocently deviate from his prior tes-

timony, however, is an insufficient basis upon which to assert a Fifth Amendment claim. Perjury necessitates the convergence of a culpable *mens rea* and a criminal *actus reus*. *Apfelbaum*, 445 U.S. at 131. Neither is present here. Moreover, there was no claim by Conboy, before Judge Singleton or at any other time in this proceeding, that his civil deposition testimony might reveal perjury in his prior immunized testimony. Conboy's only claim was that his immunized testimony was incriminating and repetition of that testimony, absent a separate and independent grant of immunity, subjected him to the possibility of prosecution.[12]

If the claimed concern is that Conboy is going to commit perjury in his civil deposition by repudiating his earlier truthful immunized testimony, he has no Fifth Amendment privilege to assert. As this Court held in *Apfelbaum*, there is no doctrine of "anticipatory perjury" in our jurisprudence, and "a future intention to commit perjury or to make false statements" does not justify invocation of the Fifth Amendment. 445 U.S. at 131.

Second, the *en banc* majority posits that the procedure authorized by the district judge exposes Conboy to a waiver of his Fifth Amendment rights. The argument is that if Conboy's deposition testimony, either by trick or inadvertence, strays beyond the four corners or confines of his immunized grand jury testimony, such new testimony may constitute a wholly independent usable source of evidence, available for use against him in a later criminal prosecution. This waiver concern is equally

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[12] Any claim at this stage that Conboy's deposition testimony might reveal perjury in his immunized testimony would be contrary to the position taken before the district judge and belately raised. *See Fleischacker*, 644 F.2d at 75 n.7.

unfounded. Both Conboy and his attorney had copies of Conboy's government interview and Grand Jury transcripts at the deposition. The questions asked of the witness were taken from and confined to the transcripts. See p.5 note 4, *supra*. Indeed, the witness and his attorney were directed to the pages in the immunized transcripts from which the questions were to be taken in order to permit them to follow the examination exactly. There simply was no danger of the witness straying beyond the confines of his immunized testimony unless he voluntarily chose to do so. If the witness newly recalled additional information not given in his immunized testimony, such information would be protected if *responsive* to the immunized questions. Similarly, details embraced within the immunized testimony would be protected as derivative of such testimony. In short, where the immunized testimony is the source of the questions posed and the examination is confined to specific subjects actually touched upon by questions appearing in the transcript of the immunized testimony, responsive answers would be "derived from" the immunized testimony and, therefore, unavailable for prosecutorial use. *Fleischacker*, 644 F.2d at 78-80. Moreover, it is fundamental that a witness may not inadvertently, or without design, waive constitutional privileges. *Brewer v. Williams*, 430 U.S. 387 (1977); *Johnson v. Zerbst*, 304 U.S. 458 (1938). If Conboy were to volunteer incriminating information unrelated to his immunized testimony, no protection would or should extend to such testimony. This would be a clear and intentional waiver, in no way compelled by the district court's Order.

C. The Possibility That Conboy's Interview And Grand Jury Transcripts May Be Held Admissible Under Rule 804 Of The Federal Rules of Evidence Does Not Answer The Question Nor Moot The Need For Conboy's Deposition Testimony.

As a final ground for its holding, the *en banc* majority urges that Conboy's deposition testimony may be unnecessary because his interview and Grand Jury transcripts may be admissible under Rule 804 of the Federal Rules of Evidence. If Conboy's Fifth Amendment assertion were upheld, he would be "unavailable" as a witness thereby satisfying one of the conditions for admission under Rule 804. Whether Conboy's transcripts are admissible under Rule 804, however, does not answer the question presented, namely, whether Conboy's civil deposition testimony which repeats verbatim or closely tracks his prior immunized testimony is constitutionally and statutorily protected because derived from such immunized testimony. The answer to that question does not turn on whether the same or similar evidence is otherwise available. If the deposition testimony is protected, Conboy had no Fifth Amendment privilege to assert and the district judge was correct in compelling him to answer. Petitioners are entitled to proceed with the deposition (assuming the witness purges himself of contempt by testifying) and introduce the deposition testimony in evidence at trial under Rule 32 of the Federal Rules of Civil Procedure, rather than risk an adverse ruling on admissibility of Grand Jury transcripts under Rule 804. As Judge Cummings noted in the panel decision, petitioners are entitled to Conboy's deposition testimony because "the vagaries of evidentiary rulings might otherwise prevent [the Grand Jury transcripts] admission at the coming trial." 655 F.2d at 752 n.4. Moreover, even if the Grand Jury transcripts were held admissible under Rule 804, that ruling would be subject to possible

objection and a claim of prejudicial error on appeal[13]—an uncertainty not present when the deposition testimony is offered under Rule 32.

The *en banc* majority further suggests that if the absence of opportunity to cross-examine would preclude admission of the government interview and Grand Jury transcripts under Rule 804, it would also preclude admission of the deposition testimony. This assumes defendants would be blocked from conducting meaningful cross-examination at the deposition by Conboy's frivolous assertions of the Fifth Amendment. There is no basis for this speculation. Certainly, defendants would be entitled to test the verity and credibility of Conboy's repeated immunized testimony without going beyond the confines of that testimony and, upon the witness's refusal to answer on Fifth Amendment grounds, to secure an order compelling such testimony. However, any attempt to ask incriminating questions beyond the confines of the grand jury testimony in order to invoke genuine Fifth Amendment assertions by the witness would be both inimical to the interests of defendants and perceived for the obvious ploy that it would be and not as a denial of meaningful cross-examination.

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[13] Indeed, in a recent case the Fifth Circuit noted in dicta that Grand Jury transcripts may only be admitted as evidence in a civil trial in rare and exceptional circumstances. *United States v. Thevis*, 665 F.2d 616, 629 (5th Cir. 1982).

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Supreme Court, U.S.
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No. 81-825

In the

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION, APPEAL OF JOHN A. CONBOY, DEPONENT,

THE PILLSBURY COMPANY, et al.,

Petitioners,

vs.

JOHN A. CONBOY,

Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals
for the Seventh Circuit

BRIEF FOR RESPONDENT

MICHAEL W. COFFIELD
KEVIN M. FLYNN
COFFIELD UNGARETTI HARRIS & SLAVIN
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400
Attorneys for Respondent,
John A. Conboy

MARCH 23, 1982

The Schaffer Press, Inc.—(312) 263-0850

QUESTIONS PRESENTED

1. Whether the district court's determination that Respondent's compelled civil deposition testimony is "derived from" his prior immunized grand jury testimony, and thus would be held inadmissible by another court in a possible future criminal prosecution, inadequately supplants Respondent's Fifth Amendment privilege against self-incrimination.

2. Whether the district court improperly compelled Respondent to testify over his Fifth Amendment claim without first providing an absolute assurance that the compelled testimony could never be used against Respondent in a possible future criminal prosecution.

3. Whether the district court, in compelling Respondent to repeat his prior immunized grand jury testimony at deposition in this civil proceeding, acted in violation of the explicit language and legislative intent of the federal use immunity statute and beyond the proper scope of its judicial authority.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-825

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION, APPEAL OF JOHN A. CONBOY, DEPONENT,

THE PILLSBURY COMPANY, et al.,

Petitioners,

vs.

JOHN A. CONBOY,

Respondent.

On Petition For Writ of Certiorari To
The United States Court of Appeals
for the Seventh Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This appeal addresses the scope of the federal use immunity statute (18 U.S.C. §§ 6001-6005) and the protections afforded by the Fifth Amendment to the Constitution as they apply to a civil deposition witness who has previously been granted federal use immunity and

who remains subject to possible future criminal prosecution for acts reflected in his prior immunized testimony.

The Respondent, John A. Conboy, was one of several immunized grand jury witnesses in an investigation into an alleged nation-wide conspiracy to fix prices in the corrugated container industry. That investigation culminated in the indictment of fourteen companies and twenty-six individuals in two separate cases from which this civil antitrust litigation, M.D.L. 310, emanates.[1]

During the course of the investigation, Mr. Conboy submitted to an interview with Department of Justice attorneys after receiving a letter promise of immunity from J. Albert Kroemer of the Department of Justice, Antitrust Division (J. A. 13).[2] Relying on this promise of immunity and on the secrecy of grand jury proceedings, Mr. Conboy answered numerous questions concerning his knowledge of alleged price communications among suppliers in the corrugated container industry. A verbatim transcript of the interview was taken (J. A. 51).

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[1] *United States* v. *International Paper Co.*, Cr. No. H-78-11 (S.D. Tex. filed January 25, 1978); *United States* v. *Boise Cascade Corp.*, Cr. No. H-78-12 (S.D. Tex. filed January 25, 1978).

[2] "J. A. —" refers to pages of the Joint Appendix previously filed with the Court. Mr. Kroemer's letter of January 10, 1978 stated in pertinent part that:

> [T]he information which you reveal in the course of the interview and the transcript derived therefrom, along with the personal documents which you deliver to us, will be given the same treatment and protections afforded statements made before a grand jury pursuant to a court order compelling testimony and granting immunity.

Pursuant to an order of the district court entered after certification by the United States Attorney that Mr. Conboy's testimony "may be necessary to the public interest" (18 U.S.C. § 6003 (b)(1)), Mr. Conboy was given a separate and independent grant of use immunity covering his live testimony before the grand jury (J. A. 15). Pursuant to this order of immunity, Mr. Conboy testified before the grand jury reiterating the information provided during his earlier interview and expanding upon his knowledge of alleged price communications in the corrugated container industry (J. A. 152).

Two corporations and seven individuals elected to go to trial in the criminal actions and all were acquitted by the jury. Mr. Conboy was not called as a witness in the criminal trial. Following the conclusion of the criminal trial, numerous treble damage civil actions, including class actions, were brought in various United States courts making substantially the same allegations as the criminal cases. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310, is a consolidation of those actions, pursuant to 28 U.S.C. § 1407.[2] The class action plaintiffs in that litigation previously settled their claims against all but one defendant. The trial against that defendant has not been finalized in the district court. In addition, nineteen "opt-out" cases also remain pending before Chief Judge John V. Singleton, Jr. of the Southern

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[2] The background of this multidistrict litigation has been explained in several prior opinions of the Fifth Circuit Court of Appeals. *E.g., In re Corrugated Container Antitrust Litigation*, 659 F.2d 1322 (5th Cir. 1981); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981); and *In re Corrugated Container Antitrust Litigation*, 620 F.2d 1086 (5th Cir. 1980).

District of Texas, Houston Division.[4] Remaining defendants in the opt-out cases scheduled for trial in 1982 include companies named earlier in the criminal indictments as well as a number of companies that were not indicted. The opt-out plaintiffs allege, among other things, that the defendants were engaged in an ongoing price-fixing conspiracy in the corrugated container industry through 1978, and that the alleged conspiracy has been fraudulently concealed by them.

The opt-out plaintiffs subpoenaed several previously immunized grand jury witnesses, including Mr. Conboy, for deposition testimony and production of documents. On May 20, 1981, Mr. Conboy appeared with counsel in Chicago for his deposition pursuant to a subpoena issued from the United States District Court for the Northern District of Illinois (J. A. 16). During the initial stages of his deposition, Mr. Conboy answered several questions concerning the dates and general nature of his past employment with the Weyerhaeuser Company, one of the defendants in the litigation (J. A. 21-22). Mr. Conboy was then asked to confirm that he had testified at the Department of Justice interview in Dallas, Texas on January 10, 1978, and before the Corrugated Container Grand Jury in Houston on January 18, 1978; to identify as "true and correct" transcripts of both his interview and live grand jury testimony; and whether his responses at the interview and before the grand jury had been

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[4] A more detailed explanation of the present status of the underlying proceedings is provided in a separate petition for certiorari arising from this same litigation entitled *The Mead Corporation, et al.* v. *Adams Extract Co., et al.*, No. 81-1583, which was filed with the Court on February 24, 1982.

"true and correct."[5] Counsel for Mr. Conboy objected to these lines of inquiry based upon the grand jury secrecy provisions of the Federal Rules of Criminal Procedure, Fed. R. Crim. P. 6(e), and Mr. Conboy, upon advice of his counsel, asserted his Fifth Amendment privilege against self-incrimination in response to these questions (J. A. 22-26). Mr. Conboy did acknowledge that any testimony which he may have provided the government in connection with its investigation of the corrugated container industry was given pursuant to prior grants of immunity (J. A. 26).

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[5] By order entered by Judge Singleton on January 25, 1980, "selected portions" of Mr. Conboy's interview and grand jury transcripts which referred to "non-settling defendants" were to be made available to all plaintiffs. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex. January 25, 1980). Mr. Conboy joined in an interlocutory appeal of Judge Singleton's January 25, 1980 order which was pending before the Fifth Circuit Court of Appeals at the time of Mr. Conboy's deposition on May 20, 1981. Neither Mr. Conboy nor his counsel were aware that his entire interview and grand jury transcripts had been disclosed to opt-out plaintiffs until his deposition (J. A. 27). The Fifth Circuit dismissed the appeal of Judge Singleton's disclosure order on October 29, 1981. *In re Corrugated Container Grand Jury*, 659 F.2d 1330 (5th Cir. 1981). The propriety of Judge Singleton's order disclosing the interview and grand jury transcripts of Mr. Conboy and others is the subject of a separate petition for certiorari, *The Mead Corporation, et al.* v. *Adams Extract Co., et al.*, No. 81-1583, which was filed with the Court on February 24, 1982. If this Court finds the disclosure of Mr. Conboy's interview and grand jury testimony to be improper, then this Court does not have to reach the question raised by Petitioners in the pending appeal.

The balance of the questions put to Mr. Conboy during the deposition were comprised of questions previously asked by Department of Justice attorneys during Mr. Conboy's interview on January 10, 1978. All questions concerned Mr. Conboy's alleged involvement in pricing communications and activities during his tenure as Regional Marketing Coordinator for Weyerhaeuser's Central Region located in Worthington, Ohio.[4] Mr. Conboy asserted his Fifth Amendment privilege in response to these questions and his counsel advised counsel for the opt-out plaintiffs that Mr. Conboy would invoke his Fifth Amendment privilege in response to all further questions concerning pricing communications or activities (J. A. 37-38).

Counsel for the opt-out plaintiffs then suspended the deposition and telephoned Judge Singleton in Houston seeking an immediate ruling compelling Mr. Conboy to testify over his Fifth Amendment invocation. Judge Singleton was advised of the operative facts concerning

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[4] The interrogation fell into the following pattern: A question was asked from the transcript; then it was rephrased to include the transcript answer (i.e., "[i]s it not the fact that. . . ."); finally, Mr. Conboy would be asked if he had "so testified" in his interview statement. An example of this three-question pattern is as follows:

> Q: Who did you have price communications with at Alton Box Board?
>
> . . . .
>
> Q: Is it not the fact that you had price communications with Fred Renshaw and Dick Herman . . . at Alton Box Board?
>
> . . . .
>
> Q: Did you not so testify in your government interview statement of January 10, 1978?

(J. A. 29-31).

Mr. Conboy's employment in the corrugated container industry and that Ohio had no criminal antitrust statute of limitations (J. A. 38-40).[7] Counsel for Mr. Conboy argued that even though the prior testimony had been immunized, new answers to those same questions, or even new answers confirming that the previous answers had been given, could tend to incriminate Mr. Conboy; that Mr. Conboy's fear of self-incrimination was based upon the nature of his *answers* to the deposition questions regardless of their source (J. A. 40-43).

Judge Singleton advised the parties that he was empowered to sit as a district judge in Illinois under 28 U.S.C. § 1407,[8] and began to question Mr. Conboy regarding his employment history in Ohio and his knowledge of the existence of any pending criminal investigation by Ohio authorities (J. A. 44-46). Based upon Judge Singleton's view that Mr. Conboy was unable to establish the existence of a pending criminal investigation in Ohio relating to the corrugated container industry, Judge

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[7] Ohio's criminal antitrust statute states in pertinent part:

> No Statute of Limitation shall prevent or be a bar to any suit or proceeding for any violation of Section 1331.01 to 1331.14, inclusive, of the Revised Code.

Ohio Rev. Code Ann. § 1331.12. The constitutionality of this statute has been upheld in *Ohio ex. rel. Brown* v. *Klosterman French Baking Co.*, 1977-1 Trade Cases ¶ 61,361 (S.D. Ohio, 1976).

[8] 28 U.S.C. § 1407(b) provides in pertinent part that in multi-district litigation judges to whom pretrial proceedings are assigned "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions. . . ." *See In re Corrugated Container Antitrust Litigation, Appeal of Phillip L. Fleischacker*, 644 F.2d 70, 76 n.6 (2d Cir. 1981).

Singleton ordered him to answer the specific questions previously asked. Mr. Conboy again respectfully declined to answer, asserting his Fifth Amendment privilege (J. A. 46-47). Judge Singleton found Mr. Conboy to be in civil contempt pursuant to 28 U.S.C. § 1826, fined him $5,000 and imposed a six-month imprisonment. Judge Singleton stayed execution of the order pending appeal to the Seventh Circuit Court of Appeals.

An expedited appeal followed under the provisions of the recalcitrant witness statute, 28 U.S.C. § 1826.* The panel majority of the Seventh Circuit upheld the order of civil contempt on the narrow basis of their conclusion that:

> Because the *questions* asked in this deposition were taken verbatim from or closely tracked the transcript of Conboy's grand jury testimony, we believe that his *answers* at the deposition would be 'derived from' the prior immunized testimony and therefore unavailable for use in any subsequent criminal prosecution.

In re Corrugated Container Antitrust Litigation, Appeal of John Conboy, 655 F.2d 748, 751, *rev'd. en banc*, 661 F.2d 1145 (7th Cir. 1981) (emphasis added).

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*28 U.S.C. § 1826(b), provides in pertinent part that "[a]ny appeal from an order of confinement under this section [recalcitrant witnesses] shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." Mr. Conboy's appeal was docketed with the Seventh Circuit on June 17, 1981. The parties completed their submission of briefs to the court on July 10, 1981. Oral argument was heard on July 15, 1981 and the panel majority and dissenting opinions were issued on July 17, 1981.

In a comprehensive dissenting opinion, Judge Sprecher noted that the panel majority decision had overlooked the bulk of the essential legal issues presented for review and misapprehended the one point of law upon which they had relied. 655 F.2d at 754 (Sprecher, J., dissenting).

Mr. Conboy petitioned for rehearing *en banc*. On September 2, 1981, the petition was granted (J. A. 19). Oral argument was heard before the *en banc* court on September 10, 1981. In a four-to-one opinion, the Seventh Circuit Court of Appeals reversed Judge Singleton's contempt order, adopting and republishing Judge Sprecher's dissenting opinion from the majority panel decision as the *en banc* majority opinion. *In re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 661 F.2d. 1145 (7th. Cir. 1981), *cert. granted sub nom. Pillsbury Co.* v. *Conboy*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825).

Following this Court's decision in *Hoffman* v. *United States*, 341 U.S. 479 (1951), the *en banc* majority first determined that Mr. Conboy remained subject to possible prosecution by both state and federal authorities based upon the admittedly incriminating nature of the testimony sought and the fact that all applicable statutes of limitation had not run.[10] The court concluded that

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[10] The court noted that Mr. Conboy "must harbor a reasonable fear of prosecution for federal antitrust conspiracy until 1983" and that he remains subject to prosecution in Ohio because criminal actions brought under that state's antitrust laws are not subject to a statute of limitations. 661 F.2d at 1151-1153; *see* note 7 *infra*. The court also found the basis for Judge Singleton's contempt order to be "clearly incorrect" by improperly requiring Mr. Conboy to prove the existence of an impending

Mr. Conboy remained entitled to assert his Fifth Amendment privilege unless his deposition testimony, and any information derived therefrom, could be absolutely protected from use against him in a subsequent criminal action. 661 F.2d at 1153.

The *en banc* majority next held that based upon this Court's interpretation of 18 U.S.C. § 6002 in *Kastigar* v. *United States*, 406 U.S. 441 (1972), Mr. Conboy's answers to questions based upon his earlier immunized testimony would constitute an independent source of evidence not *necessarily* protected from use by prosecutors in a later criminal prosecution. The *en banc* majority reasoned that answers to such questions, unlike the questions, are not necessarily "directly or indirectly derived" from the prior immunized testimony but are derived from Mr. Conboy's "current, independent memory of events". Accordingly, there can be no guarantee that in a subsequent prosecution of Mr. Conboy, a prosecutor would not succeed in arguing that Mr. Conboy's answers to the proposed questions, or information derived from those answers, constitute a new and independent source of evidence admissible against him. 661 F.2d at 1155, 1157. The *en banc* majority distinguished the nature and scope of the protection afforded under a grant of statutory immunity from the "immunity" that is inad-

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[10] (continued)

criminal investigation against him. 661 F.2d at 1151. Neither the court's determination of Mr. Conboy's remaining risk of prosecution nor the court's finding that Judge Singleton failed to follow the procedures established by this Court in determining the legitimacy of a Fifth Amendment assertion are raised by Petitioners in this appeal and, accordingly, these issues are not addressed by Mr. Conboy herein.

vertently conferred upon subsequent application of the exclusionary rule to remedy an interrogation violative of the Fifth Amendment privilege. 661 F.2d at 1154.

The *en banc* opinion also noted the several "serious practical problems" with compelling Mr. Conboy to answer questions previously asked of him under grant of immunity. 661 F.2d at 1158. First, the *en banc* majority, citing to this Court's opinion in *United States* v. *Apfelbaum*, 445 U.S. 115, 123 (1980), and *United States* v. *Housand*, 550 F.2d 818 (2nd Cir.), *cert. denied*, 431 U.S. 970 (1977), found that compelling Mr. Conboy to answer questions previously asked under grant of immunity could subject him to prosecution for perjury or giving false statements under 18 U.S.C. § 1623(c), even without a specification in the indictment as to which answer is false. 661 F.2d at 1158. Second, the *en banc* majority found that Mr. Conboy would face a "serious problem of waiver" if he were to stray beyond the four corners of his earlier immunized testimony, citing this Court's opinion in *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). 661 F.2d at 1158.

Finally, the *en banc* majority found that whatever evidentiary obstacles confront the admissibility of Mr. Conboy's grand jury testimony at trial would most likely also confront Mr. Conboy's compelled deposition testimony. The risk that Mr. Conboy's grand jury testimony might not be admitted was determined by the court to be preferable to the risk that Mr. Conboy's compelled deposition testimony might be held admissible against him by another court in a future criminal prosecution. 661 F.2d at 1158-59. As stated by the *en banc* majority, "[a]ny inconvenience to the plaintiffs must pale in the face of denial of the fundamental right against self-incrimination." 661 F.2d at 1159.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is essential to an understanding of the issues presented by this appeal to recognize the effect of the trial court's contempt ruling which was reversed by the Seventh Circuit *en banc*. Judge Singleton compelled Mr. Conboy to testify over his Fifth Amendment invocation on the premise, among others, that because the court had previously ordered the disclosure of Mr. Conboy's grand jury testimony to Petitioners, the *questions* which Petitioners might put to him on deposition in this separate civil proceeding would be "derived" from the previously immunized grand jury testimony. As a result, both Judge Singleton and the Seventh Circuit panel majority concluded that Mr. Conboy's prior grants of use immunity "necessarily" extend to the *answers* which he might give to those questions at deposition in this civil proceeding.

The practical effect of such ruling is that a judge, by the simple expedient of granting a motion for production of grand jury transcripts, may himself grant immunity, upon private plaintiffs' request, not the government's. That principle, if sustained, would make a mockery of the use immunity statute and would write the Fifth Amendment out of the Constitution as to all individuals who have ever been granted use immunity. As the Seventh Circuit *en banc* majority found, such a result contravenes this Court's prior decisions on the intended scope of use immunity, usurps the prerogative granted by Congress to the Executive Branch to authorize grants of immunity and burdens future prosecutorial efforts by providing witnesses with the op-

portunity to take "immunity baths" which statutory use immunity was intended to avoid.

1. The Seventh Circuit's *en banc* decision reversing the contempt citation for Mr. Conboy's refusal to testify based on his Fifth Amendment privilege reaffirms this Court's holding in *Kastigar* that a grant of use immunity under 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. Accordingly, a grant of statutory use immunity affords no protection to any self-incriminating information disclosed by the immunized witness on any other occasion prior or subsequent to the giving of the immunized testimony.

2. Mr. Conboy's compelled civil deposition testimony, even if identical to his prior immunized testimony, would constitute an independent source of evidence not protected by prior grants of immunity. Although the questions might be directly or indirectly derived from immunized grand jury transcripts, the answers would not be so derived and thus would not be protected.

3. The district court's order compelling Mr. Conboy to testify over his Fifth Amendment claim amounted to a *de facto* grant of immunity and an erroneous prospective application of the exclusionary rule. Whether or not Mr. Conboy's testimony in this proceeding would be held inadmissible in a future criminal prosecution simply cannot be determined at this juncture and should have no bearing whatsoever in determining whether Mr. Conboy is entitled to invoke the Fifth Amendment in response to the questions at issue.

4. Mr. Conboy's central concern for assurance and security from the use of his deposition testimony in a possible future criminal prosecution overrides the private civil plaintiffs' unarticulated claim of need for Mr. Conboy's deposition testimony. The district court's ruling will not provide the parties to this litigation with any testimony they do not already have and whatever evidentiary obstacles confront the admissibility of Mr. Conboy's prior grand jury testimony will likewise confront the admissibility of Mr. Conboy's deposition testimony.

ARGUMENT

I.

THE SEVENTH CIRCUIT *EN BANC* DECISION REAFFIRMS THIS COURT'S HOLDING IN *KASTIGAR V. UNITED STATES* THAT THE FEDERAL USE IMMUNITY STATUTE IS INTENDED TO PROVIDE PROTECTION COEXTENSIVE WITH THE FIFTH AMENDMENT.

A. *Kastigar* Clearly Demonstrates That a Grant of Use Immunity Under 18 U.S.C. § 6002 Affords No Protection to Any Self-Incriminating Information Disclosed By the Witness on Any Other Occasion.

Despite the Petitioners' representations to the contrary, the Seventh Circuit *en banc* decision below is in complete accord with this Court's opinion in *Kastigar* v. *United States*, 406 U.S. 441 (1972). The *en banc* decision reinforces the holding in *Kastigar* "by examining the nature of the concept termed 'immunity.'" 661 F.2d at 1154.

By granting immunity to a witness, the government can override a valid Fifth Amendment claim of privilege. The abrogation of this constitutional right is supported by the principal that a necessary and essential power of government is to compel testimony. *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). Until 1970, the government's only immunity option was a grant of "transactional" immunity, which afforded a witness complete immunity from subsequent prosecutions for the acts about which he testified. Early attempts to codify a less comprehensive immunity were overturned by this Court

in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), in which this Court struck down the Federal Immunity Act of 1868, stating that to be valid, a statutory enactment "must afford absolute immunity against future prosecution for the offense to which the question relates." 142 U.S. at 585-86.

The broad protection afforded under "transactional" immunity sometimes gave rise to "immunity baths," immunizing the witness from prosecution for all crimes disclosed in his testimony. *See United States* v. *Turkish*, 623 F.2d 769, 775 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). Accordingly, prosecutors were frequently reluctant to grant immunity to potential targets of criminal investigations. In 1970, however, Congress enacted the Witness Immunity Act of 1970, 18 U.S.C. §§ 6001-6005 (1976), which repealed the authority for transactional immunity statutes and provided a less comprehensive form of immunity designated "use" immunity. *See United States* v. *Herman*, 589 F.2d 1191, 1202-03 (3rd Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *Goldberg* v. *United States*, 472 F.2d 513, 515 (2d Cir. 1973). Congress clearly intended to limit the extent of the protection afforded by an immunity grant under this statute, stating specifically that "the proposed provision is not an immunity bath." H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 5, *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4017.

The constitutionality of the use immunity statute was upheld by this Court in *Kastigar* v. *United States*, 406 U.S. 441 (1972). The Seventh Circuit *en banc* decision here recognized what this Court established unequivocally in *Kastigar*. In certain testimonial situations the Fifth Amendment privilege can be supplanted by a grant of

statutory use immunity which affords protection against self-incrimination coextensive with the Fifth Amendment privilege. 661 F.2d at 1154 (citing *Kastigar*, 406 U.S. at 444, 453). In this case, Mr. Conboy was granted statutory use immunity upon petition by the government for an immunity order to elicit testimony before the grand jury (J. A. 15). Under 18 U.S.C. § 6002, only the United States Attorney can initiate a request to the court that immunity be granted. *See e.g., In re Grand Jury Proceedings of United States*, 626 F.2d 1051, 1057-1058 (1st Cir. 1980); *United States* v. *Jenkins*, 470 F.2d 1061, 1063-64 (9th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

As required by the Constitution, the use immunity provided to Mr. Conboy was "coextensive" with his constitutional privilege against self-incrimination. But when the constitutionality of the present federal use immunity statute was upheld by this Court in *Kastigar* it was made clear that it is only the *source* of the information, not the *substance*, which is protected under use immunity:

> While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege.
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> The statute, like the Fifth Amendment, grants neither pardon nor amnesty. *Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.*
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> We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial author-

> ities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it.

406 U.S. at 453, 461-462 (emphasis added).

The *en banc* panel recognized the teaching of *Kastigar* that a grant of statutory use immunity affords no protection to any self-incriminating information disclosed by the immunized witness on any other occasion prior or subsequent to the giving of the immunized testimony. Each proceeding is distinct and in each instance a witness has the right to claim the privilege or have it supplanted by a new grant of immunity. 661 F.2d at 1154; *see United States* v. *Johnson*, 488 F.2d 1206, 1210 (1st Cir. 1973); *United States* v. *Miranti*, 253 F.2d 135, 139 (2d Cir. 1958); *In re Neff*, 206 F.2d 149, 152 (3d Cir. 1953).

Indeed, *Kastigar* teaches that use immunity does not even shield a witness from prosecution based on the very facts and activities testified to under a grant of immunity if the government can show an independent source of evidence. Thus, in *United States* v. *First Western State Bank of Minot, N.D.*, 491 F.2d 780, 782, 786 (8th Cir.), *cert. denied sub nom. Thompson* v. *United States*, 419 U.S. 825 (1974), the Eighth Circuit stated:

> Just becuse the defendants testified to certain facts before a state grand jury [under immunity] does not preclude the United States from presenting evidence of these same facts. . . .
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> The federal government . . . can use the same evidence testified to by defendants before the grand jury if it can demonstrate that the evidence to be used . . . came from a legitimate source wholly independent of the compelled testimon[y].

The immunity provisions of 18 U.S.C. §§ 6001-6005 are designed solely for the benefit of the government as a prosecutorial tool. Use immunity creates a framework within which a prosecutor can make a reasoned, strategic decision whether to compel testimony and suffer the resulting burdens on prosecution. *Kastigar, supra*, 406 U.S. at 471 (Marshall, J., dissenting). As *Kastigar* and the foregoing decisions following its holding indicate, use immunity is intended to grant an immunized witness neither pardon nor amnesty. Rather, it is meant to leave the witness and prosecutorial authorities in substantially the same position as if the witness had continued to assert his Fifth Amendment privilege and had remained silent.

Petitioners' rationale for affirming Judge Singleton's order of contempt could be applied to override the Fifth Amendment claims of any witness any number of times, so long as the witness has previously testified under a grant of immunity. Each unconstitutional interrogation of the witness would be "remedied" by subsequent application of the exclusionary rule in an effort to shield the witness from prosecution based upon the "fruits" of the improper questioning. The resulting proliferation of "immunized" testimony caused by such rulings would yield a burden on prosecutors that comports with "transactional" immunity and would clearly undermine the very purpose of the use immunity statute as construed by this Court in *Kastigar*.

B. Mr. Conboy's Compelled Deposition Testimony Would Constitute An Independent Source of Evidence Not Protected By His Prior Grants Of Immunity.

In arguing that the Seventh Circuit *en banc* opinion conflicts with this Court's ruling in *Kastigar*, Petitioners

rely upon a reading of *Kastigar* and subsequent decisions which prohibit the direct or indirect use of immunized testimony in a subsequent prosecution. Petitioners erroneously assume, as did Judge Singleton and the Seventh Circuit panel majority, that Mr. Conboy's civil deposition testimony would be "indirectly derived" from his previously immunized grand jury testimony and, therefore, inadmissible against him in any later criminal prosecution.

Contrary to Petitioner's contention, the *en banc* decision does not "read out" of the federal use immunity statute the protection against use of information "derived from" immunized testimony. Rather, the *en banc* opinion straightforwardly focuses upon the concept of "derivative use" of previously immunized testimony in explaining the erroneous expansion of that concept in other decisions.

That Mr. Conboy's civil deposition testimony would create an independent and therefore admissible source of evidence, even if it is merely a repetition of his previously immunized testimony, has already been established by lower courts. In *United States* v. *Seiffert*, 501 F.2d 974 (5th Cir. 1974), the defendant testified at a bankruptcy proceeding under the use immunity afforded by § 7(a)(1) of the Bankruptcy Act, 11 U.S.C. § 25 (a)(10), which is identical to the use immunity granted by 18 U.S.C. § 6002.[11] The defendant subsequently gave deposition testimony in connection with a separate proceeding. The Fifth Circuit held that the witness' prior im-

[11] 11 U.S.C. § 25(a)(10) provides, in pertinent part, that "no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him [the immunized witness] shall be offered in evidence against him in any criminal proceeding."

munity did not extend to the later deposition testimony even though it involved subjects covered in the immunized testimony. The court held that the witness' deposition testimony constituted an independent source of evidence which could be used as a basis for criminal prosecution. By analogy, the immunity provided by § 6002 cannot protect a deponent from the use in a criminal prosecution of testimony given after the immunized testimony. Any such subsequent testimony would constitute an independent source of evidence.

The *en banc* opinion recognized that Mr. Conboy's deposition testimony could be incriminating even if it merely repeated verbatim his prior immunized testimony, citing its earlier decision in *United States* v. *Kuehn*, 562 F.2d 427 (7th Cir. 1977). 661 F.2d at 1154. In *Kuehn*, the Seventh Circuit ruled that a defendant had created independent evidence when he repeated his previously immunized grand jury testimony to a reporter. The court also suggested that the defendant had created independent testimony by repeating his immunized story while testifying in another trial. 562 F.2d at 430.

Petitioners and the Seventh Circuit panel majority attempted to distinguish *Kuehn* on the basis that in *Kuehn*, the witness voluntarily repeated his prior immunized testimony, whereas in the present case, Mr. Conboy will be compelled to repeat his testimony. But there is no language in *Kuehn* placing any significance whatsoever on the voluntariness of the witness' repetition of his earlier testimony. The determinative factor in *Kuehn* was simply that the witness repeated in a separate proceeding testimony for which he had previously been given immunity.

The foregoing cases are all in accord with the *en banc* view that repetition of prior immunized testimony in an independent proceeding may itself be viewed as incriminating. 661 F.2d at 1155 (citing Comment, *Requiring Witnesses to Repeat Themselves,* 47 Tex. L. Rev. 266, 267 (1969)). It was upon this reasoning that the *en banc* majority determined that

> Conboy's deposition, even if it merely repeated or acknowledged his earlier testimony, could constitute an independent source of evidence against him.

661 F.2d at 1155.

Petitioners argue that Mr. Conboy's prior use immunity will continue to protect him if, in this separate civil action, he answers questions taken from his prior immunized testimony. The analysis made by Petitioners is based upon the formulation of the concept of "derivative use" of prior immunized testimony by the Second Circuit Court of Appeals in *In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker,* 644 F.2d 70 (2d Cir. 1981) (hereinafter *"Fleischacker"*) and the Eighth Circuit in *In re Order of Civil Contempt against Carlos Lee Starkey,* 600 F.2d 1043 (8th Cir. 1979) (hereinafter *"Starkey"*). The *en banc* opinion notes that the problem with these courts' formulation of the issue is that they concentrate on the wrong part of the deposition transcript. 661 F.2d at 1155. Both the Second and Eighth Circuits focused on the derivation of the questions from the witness' prior immunized testimony.[12] A

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[12] The Seventh Circuit panel majority also focused on the derivation of the questions only in determining that Mr. Conboy's civil deposition testimony will be "tainted" and therefore not incriminating, relying on the *Starkey* and *Fleischacker* decisions. This approach would pro-

witness cannot be incriminated by the questions; he can only be incriminated by the answers.

Under the language of 18 U.S.C. § 6002, as interpreted by this Court in *Kastigar,* the answers which Mr. Conboy might give in this civil proceeding have no immunity protection. Those answers are not "directly or indirectly derived" from the immunized grand jury transcripts. Rather, they are derived from Mr. Conboy's present, independent memory of events. Thus, if Mr. Conboy answered the questions at his deposition, regardless of the source of those questions, a new, unprotected source of evidence would be created. Mr. Conboy's refusal to

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[12] (Continued)

duce anomalous consequences in future criminal prosecutions which can be exemplified by using the panel majority's own hypothetical. *See* 655 F.2d at 753 n.8. The hypothetical involves two co-defendants engaged in criminal activity. One co-defendant is called before the grand jury, is given use immunity and testifies fully about both defendants' criminal activity. The panel majority states that if the non-immunized co-defendant decides to testify against the immunized co-defendant in a later criminal prosecution, "nothing in our ruling would prohibit this prosecution" based upon this testimony. *Id.*

On the contrary, because these decisions base their ruling on the derivation of the questions which are used to elicit new testimony from the witness, then if the non-immunized co-defendant is asked *questions* which were asked of the immunized co-defendant during his grand jury appearance, under these court's analysis, *his answers* are likewise "derived" from the immunized testimony of his accomplice and could not be used against his accomplice in a criminal prosecution. Such analysis effectively transforms the "use" immunity previously granted to the immunized co-defendant into a grant of "transactional" immunity from prosecution for the conduct in question if any other witness is asked questions previously asked the immunized co-defendant.

engage in such self-incrimination is a justifiable exercise of his Fifth Amendment privilege.

Petitioners' argument that Mr. Conboy's deposition testimony will be "derived from" his prior immunized testimony is based upon a fundamental misunderstanding of "use" immunity. "Direct use" of previously immunized testimony is exemplified by the introduction of the immunized testimony *per se* in a subsequent prosecution. "Indirect use" occurs when the prosecutor has access to or is otherwise influenced by that immunized testimony and cannot prove in a later criminal proceeding that his evidence was derived without the aid of the protected testimony. *See e.g., United States* v. *Jones,* 542 F.2d 186, 202 (4th Cir.) *cert. denied,* 426 U.S. 922 (1976), ("taint" hearing established non-use of immunized testimony); *United States* v. *Provenzano,* 620 F.2d 985 (3d Cir.) *cert. denied,* 449 U.S. 899 (1980), ("taint" hearing unnecessary because of government's proof that evidence was independently derived); *United States* v. *McDaniel,* 482 F.2d 305, 311 (8th Cir. 1973). Neither of these concepts contemplates the instant situation. If Mr. Conboy answered the questions at his deposition, a new, unprotected source of evidence would be created. The refusal to create such a new source is thus a justifiable exercise of his Fifth Amendment privilege against self-incrimination.

II.

THE ORDER OF THE DISTRICT COURT COMPELLING MR. CONBOY TO TESTIFY UNCONSTITUTIONALLY IMPINGED UPON HIS FIFTH AMENDMENT RIGHTS.

A. A Trial Judge Cannot Reject A Witness' Claim of Privilege On The Ground That His Prior Use Immunity May Protect Him In A Later Criminal Prosecution.

Petitioners rely upon the distressing concept that deliberate, in fact, calculated abrogations of Mr. Conboy's Fifth Amendment right against compelled self-incrimination in this civil litigation can somehow adequately supplant the protection afforded him under the Fifth Amendment. Their argument totally disregards this Court's recognition that exclusion of evidence obtained in violation of an individual's constitutional rights does not rectify the initial violation. *Maness* v. *Meyers,* 419 U.S. 449 (1975).

As the *en banc* opinion notes, in compelling Mr. Conboy to testify over his Fifth Amendment claims, Judge Singleton appears to have confused the test for the proper invocation of the Fifth Amendment with the well-established rule that if a district court errs in making a ruling on privilege, an after-the-fact exclusionary rule will apply to prevent the introduction of that evidence against the witness. 661 F.2d at 1155-56. *Kastigar* v. *United States,* 406 U.S. 411, 458 (1972) (citing *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 79 (1964)); *Maness* v. *Meyers,* 419 U.S. 449, 474-75 (1975) (White, J., concurring.); *In re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey,* 620 F.2d 1086, 1093 (5th Cir. 1980), *cert. denied sub nom. Adams Ex-*

tract Co. v. *Franey*, 449 U.S. 1102 (1981) (hereinafter "*Franey*"); *In re Folding Carton Antitrust Litigation, Appeal of R. Harper Brown*, 609 F.2d 867 (7th Cir. 1979) (hereinafter "*Brown*"). Those authorities which support an after-the-fact, retrospective exclusionary rule were not intended and should not be used as a rationale to support a prospective judicial determination which, in mandating testimony, contravenes the protection accorded the Fifth Amendment that "no person . . . shall be compelled in any criminal case to be a witness against himself."

The concept espoused in *Murphy, supra*, and its progeny is merely an application of the exclusionary rule against the evidentiary use of information obtained in violation of a defendant's constitutional rights. What the exclusionary rule and the *dicta* in the cases which follow *Murphy* teach is that evidence resulting from judicial error in application of the Fifth Amendment will be suppressed where the ruling court has the jurisdiction to do so. That concept is solely remedial and is designed to rectify *nunc pro tunc* a constitutional violation or error committed by a court in requiring testimony in abrogation of the privilege. *Franey, supra*, 620 F.2d at 1093; *Brown, supra*, 609 F.2d at 872 n.11.

As Justice Marshall noted in his *Kastigar* dissent:

> The exclusionary rules provide a partial and inadequate remedy [to unconstitutional interrogations]. An immunity statute, on the other hand, is much more ambitious than any exclusionary rule. It does not merely attempt to provide a remedy for past [constitutional violations]. An immunity statute operates in advance of the event, and it authorizes—even encourages—interrogation that would otherwise be prohibited by the Fifth Amendment.

406 U.S. at 470 (Marshall, J., dissenting). As the *en banc* opinion observes, Judge Singleton's ruling fails to distinguish between the protection afforded a witness by a grant of statutory immunity which *contemporaneously* supplants the protection afforded that witness under the Fifth Amendment, and the exclusionary rule which may be applied at a later date after a witness has been unconstitutionally deprived of his Fifth Amendment right to silence.

The apparent basis for Judge Singleton's confusion regarding the prior application of the exclusionary rule is the court's mistaken reliance upon the Eighth and Second Circuit decisions in *Starkey* and *Fleischacker*, respectively. *Starkey* found that a subsequent application of the exclusionary rule to improperly compelled testimony was "all [the protection] appellant is entitled to under 18 U.S.C. § 6001." *Starkey, supra*, 600 F.2d at 1047. Apparently following *Starkey*, Judge Singleton found that Mr. Conboy's previously granted use immunity would continue to protect him if, at a later date and in a totally separate proceeding, he repeats his testimony at deposition. *Fleischacker* acknowledged that the exclusionary rule was solely remedial and thus could not be used prospectively to justify a denial of the Fifth Amendment's protection without resulting in an unauthorized conferral of *"de facto"* immunity by the Court. *Fleischacker, supra*, 644 F.2d at 78 n.13. Notwithstanding, the *Fleischacker* court concluded that no *de facto* immunity would occur in the case before it because it was "convinced" that the witness' answers at civil deposition to questions asked of him during his immunized testimony would necessarily "derive from" the previous immunized testimony and thus be unavailable for future

use against the witness in a criminal prosecution. 644 F.2d at 78.

This Court earlier recognized in *Maness* that the policy adopted by *Starkey* and *Fleischacker* eviscerates the central value of the Fifth Amendment privilege. In *Maness*, a prosecutor attempted to subpoena materials in a civil proceeding which might have been used against the subpoenaed party in a criminal prosecution. In writing for the Court, Chief Justice Burger observed that:

> [T]he City Attorney argued that if petitioner's client produced the magazines he was amply protected because in any ensuing criminal action he could always move to suppress, or object on Fifth Amendment grounds to the introduction of the magazines into evidence. Laying to one side possible waiver problems that might arise if the witness followed that course, *cf. Rogers* v. *United States*, 340 U.S. 367 (1951), we nevertheless cannot conclude that it would afford adequate protection. *Without something more* "he would be compelled to surrender the very protection which the [Fifth Amendment] privilege is designed to guarantee."

419 U.S. 449 at 461-462 (citations omitted and emphasis supplied).

The purpose of the Fifth Amendment privilege is to ensure that an individual will not be required to produce evidence which can be used against him. In holding Mr. Conboy in contempt for his Fifth Amendment silence, Judge Singleton essentially predicts that a court in a future criminal prosecution of Mr. Conboy will feel compelled to protect against evidentiary use of the deposition testimony Petitioners seek. Mere assurances that specific testimony compelled in a civil action will not be used in subsequent criminal proceedings is inadequate. The

individual would still be compelled to testify as to possibly criminal activities without the certain protection of a new grant of immunity. As the Chief Justice stated in *Maness*, "letting the cat out of the bag" by compelling a witness to testify in reliance upon a later objection or motion to suppress would "let the cat out with no assurance whatever of putting it back." 419 U.S. at 463.

A witness' right to certainty that his incriminating testimony will not be used against him in a criminal prosecution before he can be compelled to disclose it has been expressed by Justice Marshall:

> Before the government puts its seal of approval on such an interrogation [eliciting incriminating testimony], it must provide an *absolutely reliable guarantee* that it will not use the testimony in any way at all in aid of prosecution of the witness.

Kastigar, supra, 406 U.S. at 471 (Marshall, J., dissenting) (emphasis supplied). But no government prosecutor is a party to this litigation. There is no conceivable basis for Judge Singleton's determination that another court in a subsequent criminal prosecution of Mr. Conboy would compel a prosecutor to adhere to Judge Singleton's ruling as to the admissibility of Mr. Conboy's deposition testimony. No court can guarantee at this juncture that at a subsequent criminal trial the prosecution would not in fact be found to have met its burden to prove that "the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar, supra*, 406 U.S. at 460. *See United States* v. *Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *United States* v. *De Diego*, 511 F.2d 818 (D.C. Cir. 1975); *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973).

Mr. Conboy acknowledges that the federal use immunity statute contemplates that district courts will have the responsibility of determining what is "derived use" of previously immunized testimony. However, the authority to make that determination is plainly restricted to the judge presiding over the criminal prosecution of the previously immunized witness where the prosecutor is before that judge seeking to introduce evidence to secure a criminal conviction. *Franey, supra,* 620 F.2d at 1093. Since *Kastigar* and its progeny have held that it is the prosecution which must bear the burden of proof on the issue of "taint", it necessarily follows that the issue cannot properly be raised in this civil proceeding where no governmental body, i.e., the prosecution, is even a party.

The absence of all potential prosecutors from this litigation distinguishes the present case from *Starkey.* In *Starkey,* the potential prosecutor, the State of Arkansas, was the plaintiff in the litigation. The Arkansas Deputy Attorney General was the party seeking Mr. Starkey's deposition testimony. It was the Attorney General who argued that the deposition questions were derived from Starkey's previously immunized grand jury testimony and it was this fact which led the court to compel Starkey to testify:

> Clearly, in light of the position taken by the Arkansas Deputy Attorney General that Starkey's deposition testimony would be tainted by the federal grand jury testimony . . . the deposition testimony would be tainted and unavailable for criminal prosecution of Starkey.

Starkey, supra, 600 F.2d at 1047. The *Starkey* court did not have to speculate as to the prosecutor's ability to

circumvent its ruling as to the future admissibility of the compelled testimony in a criminal prosecution. The prosecuting government conceded its inadmissibility and was bound by its stated position thereafter.

The error of attempting to prospectively apply the exclusionary rule in an effort to supplant a witness' Fifth Amendment rights is manifest from the nature of the rule itself. Because the exclusionary rule does not enjoy constitutional status, it can be abolished or significantly modified at any time by judicial or legislative fiat. Legislative abolition of the exclusionary rule has already been proposed by the Attorney General's Task Force on Violent Crime. *See,* Pressman, *Exclusionary Rule of Evidence Under Attack,* Chicago Daily Law Bulletin, June 10, 1981, p. 1, col. 2. The tenuous nature of the exclusionary rule is thus unable to "supplant" Mr. Conboy's Fifth Amendment rights with protection "coextensive" with those constitutional rights, as required by *Kastigar* and its progeny.

In sum, whether or not Mr. Conboy's testimony in this proceeding is "tainted" simply cannot be determined at this juncture. The "taint" concept should have no bearing whatsoever in determining whether Mr. Conboy is entitled to invoke the Fifth Amendment in response to the questions at issue in this proceeding.

B. The District Court's Ruling Amounts To An Usurpation Of A Prerogative Statutorily Vested In The Justice Department.

Petitioners attempt to justify Judge Singleton's ruling by characterizing it as merely "interpreting the scope" of Mr. Conboy's grant of immunity (Petitioners' Brief, pp. 19-20). Petitioners cite a number of cases which they claim support the method employed by Judge Single-

ton in overruling Mr. Conboy's Fifth Amendment claim.[13] In each of those cases (excepting *Franey*), however, the witness was compelled to testify over his Fifth Amendment assertions only after having been granted statutory immunity in the same proceeding in which his testimony was being compelled. Mr. Conboy does not dispute that his Fifth Amendment rights can be supplanted by a new grant of statutory immunity in this proceeding, which is all that the cases cited by Petitioners hold. Unfortunately, however, immunity is not available to Mr. Conboy in this private civil proceeding.

In contrast to Petitioners' benign characterization, Judge Singleton's ruling erroneously determined that Mr. Conboy's previously-granted immunity would continue to protect him in a subsequent criminal prosecution if, in this civil proceeding, Mr. Conboy repeats his testimony at deposition. Petitioners thus share Judge Singleton's confusion and difficulty in distinguishing between a grant of statutory immunity and the exclusionary rule. The protection afforded a witness under immunity supplants the protection afforded that witness under the Fifth Amendment; the exclusionary rule may be applied at a later date in the criminal proceeding in which the evidence at issue is sought to be used, after the witness has been found to have been unconstitutionally deprived of his Fifth Amendment privilege for any reason.

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[13] Petitioners cite *Zicarelli* v. *The New Jersey State Commission of Investigation*, 406 U.S. 472 (1972); *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972); *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79 (1964); *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); and *Franey, supra*, 620 F.2d at 1095 (Johnson, J., dissenting).

Petitioners endeavor to find support for the concept espoused in *Starkey* and *Fleischacker* by citing *Patrick* v. *United States*, 524 F.2d 1109 (7th Cir. 1975). In *Patrick*, the plaintiff had given immunized grand jury testimony which subsequently formed the basis for an Internal Revenue Service jeopardy assessment against him. The *Patrick* case arose as a result of the plaintiff's effort to enjoin the jeopardy assessment. In that context, the Seventh Circuit addressed the question whether there was any chance of the government prevailing on the merits. The holding of the case is that in fact it could not be said that the government would have no chance of prevailing. Writing for the court, Judge, now Justice, Stevens then went on to discuss a potential refund suit, not pending before the court, brought by the plaintiff, Patrick, in which Patrick would have to testify. The Court proceeded to assume, without deciding, that the necessity for such testimony would actually be equivalent to compulsion of Patrick to give testimony against himself. At that point, well beyond the holding of the case, the court expressed its view that Patrick's testimony as a civil plaintiff would be information indirectly derived from previously immunized grand jury testimony.

Petitioners' characterization of *Patrick* as somehow similar in nature or holding to *Starkey* and *Fleischacker* is, to say the least, overstating the import of *Patrick*. It is respectfully submitted that the *Patrick* court itself recognized the tenuous connection between the *holding* of the case, and its *opinion* concerning the significance of Patrick's prior immunity and perhaps even the speculative nature of that opinion. This is evidenced by the court's careful consideration of the case as an injunction action, and its purely hypothetical statements

concerning the government's possible alternative arguments in aswer to any Fifth Amendment objections raised by Patrick in a subsequent proceeding. *Patrick, supra,* 524 F.2d at 1117. The court's later observation on the actual legitimacy of such hypothetical arguments should not be taken as a holding consistent with those of *Starkey* and *Fleischacker.* The Seventh Circuit's later opinions in *United States* v. *Kuehn,* 562 F.2d 427 (7th Cir. 1977) and in *Brown, supra,* 609 F.2d 867 unequivocally reflect that Circuit's position on the issues raised in this appeal.

The *en banc* opinion notes that the proper judicial role in connection with grants of immunity is limited to seeing that the government's request complies with statutory procedure. A district court has no discretionary power to refuse the request of the prosecutor, nor may it order immunity on its own initiative, even when the court believes an immunity grant to be in the public interest. *In re Grand Jury Proceedings of United States,* 626 F.2d 1051, 1057-58 (1st Cir. 1980); *United States* v. *Housand,* 550 F.2d 818, 824 (2d Cir.), *cert. denied,* 431 U.S. 970 (1977); *In re Daley,* 549 F.2d 469, 479 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977); *Thompson* v. *Garrison,* 516 F.2d 986, 988 (4th Cir.), *cert. denied,* 423 U.S. 933 (1975). This Court in *Murphy* v. *Waterfront Commission, supra,* applied an exclusionary remedy to protect the witness from the improper use of his immunized testimony or its fruits in a subsequent criminal prosecution of that witness. But as stated in the foregoing argument, a trial judge would clearly be in error in requiring a witness to testify on the ground that the witness was protected against prejudice by virtue of *Murphy* and its progeny. *Franey, supra; Brown,*

supra; Ellis v. *United States*, 416 F.2d 791 (D.C. Cir. 1969).

In *Ellis*, the Court of Appeals for the District of Columbia explained the distinction between prospective application of *Murphy* and its proper use to remedy prior errors:

> A trial judge cannot reject a witness' claim of privilege merely on the ground that the ruling cannot hurt the witness because it will establish an immunity from subsequent prosecution.
>
> We are not here concerned with a case where a judge has made a mistake in applying legal rules, like a case where he erroneously rules that a witness has waived his privilege. In the case before us, the judge did not purport to deny that the witness had correctly presented a claim of privilege. He merely asserted that the witness would nevertheless be protected, by *Murphy*, against prosecution based on his testimony.
>
> The ruling was made by an able and conscientious trial judge. We are confident it was made in good faith, and can even discern how the judge may have come to a mis-reading of *Murphy*. *Nevertheless, his ruling was in the nature of a circular, self-fulfilling prophecy that in substance can only be viewed as a grant of immunity. That ruling was outside the scope of judicial authority.*

416 F.2d at 796 (emphasis added). See also *Franey, supra*, 620 F.2d at 1094; *In re Folding Carton Antitrust Litigation*, 465 F. Supp. 618 (N.D. Ill. 1979), *rev'd on other grounds*, 609 F.2d 867 (7th Cir. 1979).

To let stand the district court's order compelling Mr. Conboy to testify over his Fifth Amendment claim would extend the power of the judiciary beyond its intended scope. The district court, by erroneously compelling the

deposition testimony of Mr. Conboy, has improperly expanded the narrow use immunity previously afforded him by the government in order for civil plaintiffs to obtain their testimony for use in a totally distinct judicial proceeding. See *Ellis* v. *United States, supra,* 416 F.2d at 795-96; *Rutherford* v. *United States,* 365 F.2d 353, 357 and n.4 (9th Cir.), *cert. denied,* 385 U.S. 987 (1966). As Judge Will properly stated in *In re Folding Carton Antitrust Litigation, supra,* 465 F. Supp. at 629 (in a part of Judge Will's opinion not reversed on appeal):

> Such an expansion of the witnesses' immunity would come at the plaintiffs' request, not the government's. Plaintiffs would essentially be in the position of granting immunity which is a result inconsistent with Congress' antitrust policy, *cf. United States* v. *Dunham Concrete Products, Inc.,* 475 F.2d 1241, 1245 (5th Cir. 1973), and with congressional policy limiting the power to authorize grants of immunity to the Executive Branch. *Ryan* v. *C.I.R., supra,* 568 F.2d at 540. Under circumstances where the witnesses have "a reasonable fear of prosecution," compelling the deposition testimony of these five witnesses would essentially constitute an impermissible transformation of the limited "use" immunity grant envisioned under § 6002 into a "transactional" immunity grant. *See United States* v. *Kuehn, supra,* 562 F.2d at 432.

Compelling Mr. Conboy's testimony here would result in conferring on a multitude of economically-motivated private civil litigants the power to effect a grant of transactional immunity by intentionally violating a witness' Fifth Amendment rights.

In *United States* v. *Dunham Concrete Products, Inc.,* 475 F.2d 1241 (5th Cir.), *cert. denied,* 414 U.S. 832 (1973), the Fifth Circuit addressed the issue of whether witnesses

in private civil litigation should be afforded immunity to testify. The government filed an *amicus* brief to advise the court of its position that immunity may not be granted in non-government litigation because only the government may grant immunity.[14] In holding that witnesses in purely private litigation should not be entitled to immunity from criminal prosecution for their testimony, the Fifth Circuit in *Dunham* stated:

> Although the courts have historically emphasized the importance of the private antitrust action as a means of achieving the policy goals of the antitrust laws (citations omitted), private civil actions can only supplement, and not supplant, governmental efforts both civil and criminal . . . . Dunham's proposed construction of [the immunity statute] might indeed hinder governmental enforcement of the criminal provisions of the antitrust laws. First, the decision to prosecute or not to prosecute criminal violations of the antitrust laws would become a decision to be made, not by responsible Government officials, but by private antitrust plaintiffs. A zealous antitrust plaintiff could easily immunize an entire industry from criminal prosecution under the antitrust laws.

475 F.2d at 1245-46.

The Seventh Circuit also has explained why Congress restricted the power to immunize to the Executive Branch exclusively:

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[14] The immunity statute at issue in *Dunham* (15 U.S.C. § 32) was a predecessor to the present immunity statute. The language regarding who may grant immunity under that statute, however, is almost identical to the language contained in the present immunity statute, 18 U.S.C. § 6002. In fact, the court in *Dunham* referred to the present immunity statute (18 U.S.C. §§ 6001-6005) as expressly limiting authority to confer immunity to the government. 475 F.2d at 1243.

> [O]nce the bar of the privilege against self-incrimination has been raised by the witness, *the decision whether to confer immunity . . . is the product of the balancing of the public need for the particular testimony or documentary information in question against the social cost of granting immunity and thereby precluding the possibility of criminally prosecuting an individual who has violated the criminal law.* Therefore, the relative importance of particular testimony to federal law enforcement interests is a judgmental rather than a legal determination, one remaining wholly within the competence of appropriate executive officials, *i.e.*, the United States Attorney with the approval of the Attorney General or his delegate. (emphasis added)

In Re Daley, 549 F.2d 469, 478-79 (7th Cir.), *cert. denied.*, 434 U.S. 829 (1977) (emphasis added).

No authorized government official has balanced the public need for Mr. Conboy's testimony against the social cost of expanding his prior grant of immunity in order to elicit deposition testimony in this proceeding. Instead, the district court weighed the desires of economically-motivated private plaintiffs for civil discovery against what they themselves baldly and without clear authority declare to be the impermissible subsequent use of the deposition testimony in criminal prosecutions. The plain legislative mandate of the use immunity statute requires executive rather than judicial invocation of the Act's provisions. No authority allows for a private litigant to substitute its economic interests for the constitutional protection afforded Mr. Conboy.

C. The District Court's Order Compelling Mr. Conboy To Testify Improperly Exposes Him to Additional Hazards of Self-Incrimination.

Judge Singleton's ruling indicates that Mr. Conboy was compelled only to answer questions "taken directly from"

his prior immunized testimony transcripts (J. A. 5). As the foregoing argument has attempted to illustrate, even an identical answer given to a verbatim question asked during the interview or live grand jury testimony creates a new, unprotected source of evidence for a future prosecutor. *A fortiori*, a different or more expansive answer to an identical question would likewise be testimony unprotected from future prosecution, and would expose Mr. Conboy to yet additional hazards of self-incrimination.

If Mr. Conboy's answers at his deposition are even inconsistent with his prior immunized testimony, he could be subject to prosecution for making false declarations under oath even without a specification in the indictment as to which answer is false. Mere proof of contradictory declarations under oath is enough for conviction. *See* 18 U.S.C. § 1623(c). *United States* v. *Housand*, 550 F.2d 818 (2nd Cir.), *cert. denied*, 431 U.S. 970 (1977).

In *Housand*, the Second Circuit Court of Appeals held that a witness, in precisely the situation confronting Mr. Conboy here, may claim his Fifth Amendment privilege and refuse to testify a second time on matters about which he has previously given immunized testimony, since even an inconsistency between his prior immunized testimony and that being sought might give rise to a false declarations prosecution:

> The Fifth Amendment privilege question arises when the witness refuses to answer on the ground that his second version of the event may result in his prosecution for perjury. . . . [T]he giving of [inconsistent] testimony on the second occasion could surely trigger investigation of whether the original testimony was false. . . . This is a reasonable cause for apprehension, and supports the claim of privilege.

550 F.2d at 823.

In the case at hand, Mr. Conboy's counsel expressed his concern during the telephonic hearing on Petitioners' motion to compel that any affirmative response by Mr. Conboy to the questions asked could place him in "additional jeopardy" of self-incrimination (J. A. 43). Petitioners suggest that this statement was insufficient to preserve on appeal the issue addressed in *Housand*. The *en banc* opinion disagrees. *See* 661 F.2d at 1157-1158.

Petitioners maintain that the fear that answers to deposition questions may "innocently deviate" from Mr. Conboy's immunized testimony is an insufficient basis upon which to assert a Fifth Amendment claim. Rather, Petitioners contend that in order for the protection provided by *Housand* to apply in the present case, Mr. Conboy must assert that his truthful deposition testimony in this proceeding "might reveal perjury in his prior immunized testimony" (Petitioners' Brief, p. 24).

Petitioners' argument is misplaced for two reasons. First, *Housand* indicates a prima facie case under 18 U.S.C. § 1623(c) is established by mere proof of *contradiction;* no *mens rea* need be alleged nor established. Any contradiction between Mr. Conboy's prior immunized testimony and his deposition testimony, innocent or otherwise, could prompt an investigation under 18 U.S.C § 1623 and thus subject Mr. Conboy to more than a "trifling or imaginary" hazard of self-incrimination. Nothing in this Court's decision in *United States* v. *Apfelbaum,* 445 U.S. 115 (1980), is to the contrary.

Secondly, Petitioners' contention that Mr. Conboy must assert that his prior immunized testimony was false in order to claim a possibility of self-incrimination resulting from truthful deposition testimony in this proceeding

would require Mr. Conboy to surrender the very protection which the Fifth Amendment privilege is designed to guarantee. *Hoffman* v. *United States,* 341 U.S. 479 (1951).

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

341 U.S. 486-487. Any explanation by Mr. Conboy, beyond that already given, as to why or why not his deposition testimony could subject him to prosecution for false declarations under 18 U.S.C. § 1623 would itself involve a risk of "injurious disclosure" under *Hoffman* and its progeny.

Judge Singleton's contempt order and the decisions in *Starkey* and *Fleischacker* lead to a paradoxial result when the questions asked during the immunized grand jury appearance are basic in nature, e.g., "did you ever exchange prices with anyone at competitor XYZ Box Company?"[15] If private counsel asks this obvious question in a civil deposition without reviewing the grand jury transcript, the witness faces the danger that his deposition answer could be used against him in a criminal prosecution. *See e.g., United States* v. *Kuehn,* 562 F.2d 427 (7th Cir. 1977); *United States* v. *Seiffert,* 501 F.2d 974 (5th Cir. 1974). On the other hand, if the witness is asked the same question by counsel who has seen the grand jury transcript, a completely different result arises under the

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[15] Several of the questions which are the subject of Judge Singleton's contempt order are of this nature. (*See, e.g.,* J.A. 27-30, 46).

rule established by the Second and Eighth Circuits. Under the decisions of those courts, the answer cannot be used against the deponent because the question was "derived" from the grand jury transcript.

The *en banc* opinion also observed that the deposition interrogation authorized by Judge Singleton exposes Mr. Conboy to a waiver of his Fifth Amendment rights. 661 F.2d at 1158. It is well established that "[d]isclosure of a fact waives the privilege as to details." *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). In several instances during his immunized testimony, Mr. Conboy was asked only about the fact of a certain price communication. If Mr. Conboy repeats this testimony in the civil deposition, he may be found, by another court, to have waived his Fifth Amendment privilege as to the details of that communication to which he did not previously testify under immunity. Those details may, in turn, provide investigative leads to incriminating matters totally untouched in the prior immunized interrogations. Waiver problems of this nature were cited by Chief Justice Burger in *Maness* v. *Meyers*, *supra*, 419 U.S. at 461-462 (citing *Rogers* v. *United States*, *supra*).

Affirmation of the approach established by *Starkey*, and adopted by *Fleischaker* and Judge Singleton's contempt ruling under review, would create a judicial policy which, in effect, deliberately abrogates an individual's constitutional rights and then promises simply that the worst aspect of the violation, the possibility that a criminal prosecution will be based on the evidence derived, will be subsequently prevented. Such a policy would have the courts participating in the violation of constitutional rights, an anomolous and plainly inappropriate result.

III.

THE CONSTITUTIONAL PROTECTIONS AND PRIVILEGES OF THE FIFTH AMENDMENT SHOULD NOT BE OVERRIDDEN BY THE MERE FACT THAT PETITIONERS WILL BE DENIED A DEPOSITION.

The recurrent issue in this case is whether the fundamental constitutional privilege against self-incrimination is to be sacrificed and rendered meaningless for the pecuniary benefit of private parties who desire not to be inconvenienced by the strictures of the Fifth Amendment. Judge Singleton's ruling, in effect, suggests that the Fifth Amendment can be circumvented if it frustrates the discovery of evidence by private plaintiffs seeking redress for alleged wrongs. As the *en banc* opinion notes, "[t]he answer is that a plaintiff is only entitled to that evidence which is not otherwise protected." 661 F.2d at 1159 (citing *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972)).

By prior order of the district court, Mr. Conboy's entire immunized testimony transcripts were disclosed to Petitioners.[16] Petitioners contend that Mr. Conboy has no legitimate fear of a perjury prosecution or a waiver of his Fifth Amendment rights because Judge Singleton's order did not compel Mr. Conboy to stray beyond the "four corners" of his prior immunized testimony.[17] Petitioners add that Mr. Conboy could ensure that his deposition testimony would not stray beyond the confines of

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[16] *See* note 5 *infra*.

[17] The ostensible basis for Judge Singleton's order of contempt was Mr. Conboy's refusal to answer questions posed to him by Petitioners "just as you answered it in the interview transcript" (J. A. 46-47).

his prior immunized testimony by following the proposed deposition examination exactly by reference to the transcripts themselves (Petitioners' Brief, p. 24-25).

If Petitioners are sincere in their assertion that all they seek from Mr. Conboy is a reiteration of his prior immunized grand jury testimony, curtailment of Mr. Conboy's Fifth Amendment privilege is unnecessary. Such an exercise will yield a mere carbon copy of the prior testimony already available to Petitioners. And as noted by the *en banc* opinion, whatever evidentiary obstacles confront the admissibility of Mr. Conboy's grand jury testimony at trial will likewise confront the admissibility of Mr. Conboy's deposition testimony. 661 F.2d at 1159.[18]

In sum, Mr. Conboy is being subjected to the considerable risk that a future court in a criminal prosecution may not consider itself bound by Judge Singleton's determination that Mr. Conboy's verbatim repetition of his prior immunized testimony is not incriminating or, if incriminating, is excludable. Yet the compelled deposition testimony of Mr. Conboy will not provide the parties to this litigation with anything that they do not already have. Mr. Conboy's Fifth Amendment rights must not be jeopardized by engaging in such a fruitless exercise. His constitutional rights are rights of certainty, not of speculation. Mr. Conboy can only have certainty if his Fifth Amendment rights, as affirmed by the Seventh Circuit *en banc* majority below, are upheld and affirmed by this Court.

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[18] Mr. Conboy respectfully refers the Court to the Brief of Amicus Curiae The Mead Corporation, filed on February 25, 1982, which addresses in greater detail the issue of the admissibility of Mr. Conboy's proposed deposition testimony.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit Court of Appeals *en banc* should be affirmed.

Respectfully submitted,

MICHAEL W. COFFIELD
KEVIN M. FLYNN
COFFIELD UNGARETTI HARRIS & SLAVIN
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400
Attorneys for Respondent,
John A. Conboy

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Petitioner's Reply Brief

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No. 81-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PILLSBURY COMPANY, ET AL.,

Petitioners,

vs.

JOHN A. CONBOY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

FRANCIS J. MCCONNELL
(Counsel of Record)
EDWARD F. RUBERRY
WILLIAM R. JANSEN
135 South LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131

Attorneys for the Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I.

In an attempt to accommodate the *en banc* decision below with this Court's holding in *Kastigar v. United States*, 406 U.S. 441 (1972), respondent makes a two-step argument. Respondent first argues that the immunity statute protects only the *source* and not the *substance* of the information disclosed in the immunized hearing. The statute, as the Court observed in *Kastigar*, "grants neither pardon nor amnesty." 406 U.S. at 461. Accordingly, Conboy remains subject to prosecution, at least in theory, upon the very same information disclosed to the Grand Jury under the grant of immunity,

if the prosecutor can establish that the incriminating evidence came from a legitimate source wholly independent of the compelled testimony. 406 U.S. at 460. Respondent then argues that even if Conboy's civil deposition testimony is confined to repetition of his prior immunized testimony, it would constitute such a legitimate and independent source of evidence. It is urged that the deposition answers, unlike the questions, are not protected because they are not "derived from" the immunized testimony; "[r]ather, they are derived from Mr. Conboy's present, independent memory of events." Thus, since the answers are not protected, respondent was justified in asserting the Fifth Amendment.

Distilled, these arguments and the holding of the *en banc* majority reduce to the proposition that the deposition *answers*, as distinguished from the questions, even if confined to a mere repetition of the immunized testimony, constitute a new and unprotected source of evidence. As Chief Judge Cummings observed in dissenting, this is an "arid" distinction, resting on "an unduly restrictive reading of the statutory language and on a misconception about the effect of repetition of testimony". 661 F.2d at 1159.

Respondent concedes that deposition questions which repeat verbatim or closely track the immunized transcript would be protected as derivative information. There is no logical basis for according answers which similarly track the immunized transcript any different status. Where the immunized testimony serves as the source of the questions asked, responsive answers to such questions, necessarily, will "derive from" the immunized testimony. The panel majority would have treated Conboy's answers as falling within the category of "information directly or indirectly derived from" his immune testimony where the questions were framed to

give the witness the choice of (1) repeating his originally immunized answer, (2) adopting his immunized answer when it was repeated to him, or (3) affirming that the transcript of his immunized answer was his prior testimony. 661 F.2d at 1160.

Conboy and his attorney had a copy of his immunized interview and Grand Jury transcripts. They could check the transcripts and assure themselves that the examination was confined to the "four corners" of the immunized testimony. The verbatim questions and Conboy's review of his earlier answers, as contained in the immunized transcript, could evoke several responses. If Conboy's current, independent memory of events was as he had earlier testified, he could either repeat his originally immunized answer or adopt his immunized answer when it was repeated (examples 1 and 2). If, when deposed, Conboy had no independent recollection of the events about which he had earlier testified, he could affirm that the transcript of his immunized answer was his prior testimony (example 3). If Conboy at deposition newly recalled additional information responsive to the question not disclosed in his immune testimony, his further answer would derive from reviewing his earlier, incomplete answer, as well as the question. Even if Conboy were to give an answer inconsistent with his prior answer, assuming he was honestly mistaken in his earlier immune testimony, the second inconsistent answer would be triggered by and derive from a reading of his earlier immunized answer. The latter two examples would be instances of refreshed, but no less, derived recollection. They would be answers which would have been given at the immune hearing but for the witness's failure to fully or accurately recall the events about which he was examined. In all examples, Conboy's "current" answer would be "derived from" his

immune testimony and therefore unavailable for use against him in any subsequent criminal prosecution.*

Respondent's reliance on *United States v. Kuehn*, 562 F.2d 427 (7th Cir. 1977) is misplaced. That case does not suggest, let alone hold, that the defendant Schwartz had created an independent source of evidence by repeating his immunized testimony in another trial. Schwartz was indicted for bribery in a state court action. Schwartz first sought unsuccessfully to dismiss the state court indictment on the ground that it was based on his federal Grand Jury testimony given under a grant of immunity. Following his federal Grand Jury appearance, Schwartz repeated his immunized testimony to Spohn, a reporter for a local newspaper. Spohn wrote an article which quoted Schwartz as saying he gave $1,000 to Rolek, the "go between," to "fix" the judge in his forgery case. Thereafter, both Spohn and Rolek testified before the state Grand Jury which indicted Schwartz. The state court denied Schwartz' motion to dismiss, observing, "[i]t seems incongruous that the defendant should be allowed to use the immunity grant as a bar to prosecution after publishing the factual background by relating substantially the same facts to one known to defendant to be a reporter for a local newspaper". 562 F.2d at 429. The United States Attorney then brought an action in the federal district court to

* The brief for *Amici Curiae* Barnum, Lindeman, Fryburg and Stalder posits the following example (pp. 13-14): Conboy in his immunized testimony discloses he exchanged prices with X and Y. At his deposition he recalls he also discussed prices with Z. *Amici Curiae* suggest, "[t]he Government could use Z as a source for a criminal prosecution against Mr. Conboy and not violate the doctrine of use immunity." This is literally true, only if the prosecutor could establish that he had no knowledge of Conboy's expanded deposition answer. If the prosecutor's knowledge of Z came in any way directly, indirectly or from information in the deposition, use of this information would be statutorily barred as derivative of the immunized testimony.

enjoin the state prosecution. Schwartz intervened. The federal district court granted the injunction. The Seventh Circuit reversed. Judge Swygert writing for the panel held, (1) that the district court was without jurisdiction to enjoin the state court action, (2) that Schwartz as a matter of law did not state a claim for intervention and (3) that the doctrine of collateral estoppel would be an additional bar to Schwartz' intervention claim. The court then stated in dictum that if it were to reach the merits it would hold "clearly erroneous" the district court's finding that the state prosecutor did not have available independent sources of evidence on which to base the indictment:

> We have examined the state grand jury testimony. Two witnesses appeared, Larry Spohn, the newpaper reporter, and Albert Rolek, the "go-between." Their testimony could not have been derived from Schwartz' immunized grand jury testimony. It was independent evidence. Schwartz' grand jury testimony was not introduced or referred to. Schwartz, by talking to Spohn "for the record," created independent evidence legitimately available to the state prosecutor. The "heavy burden" on the part of the prosecution, as *Kastigar* requires, to prove that "all the evidence it proposes to use was derived from legitimate independent sources" was met. What both the Government and the intervenor are actually seeking is transactional immunity, something that section 6002 abjures.

562 F.2d at 432. Judge Swygert, who wrote the panel opinions in *Kuehn* and *Conboy*, found nothing inconsistent in the two decisions, pointing out that *Kuehn* stands for the proposition that a defendant who "*voluntarily*" restates the substance of his prior immunized testimony creates an independent source of incriminating evidence that is not protected by the prior grant of immunity:

> That decision is clearly distinguishable from the instant case in which the court compelled the deponent to testify over his assertion of his Fifth Amend-

> ment privilege only as to matters within the scope of his prior immunized testimony.

655 F.2d at 753 n.7.

Similarly, Chief Judge Cummings, in his dissent to the *en banc* opinion, points out that *Kuehn* does not hold that a witness who has been granted immunity in one proceeding forfeits it simply by testifying in another proceeding:

> Thus *United States v. Kuehn*, 562 F.2d 427 (7th Cir. 1977), does not suggest that "the defendant had created independent testimony by repeating his immunized testimony as a witness in another trial" . . . It makes two less controversial points: (1) that a state prosecutor, who began his investigations before federal immunity was granted and took the results to a grand jury without knowledge of the immunized testimony, did not use information "directly or indirectly derived" from the immunized testimony, 562 F.2d at 430; and (2) that the witness, by talking voluntarily to a newspaper reporter, had "created independent evidence legitimately available to the state prosecutor", *id.* at 432.

661 F.2d at 1160.

United States v. First Western State Bank of Minot, 491 F.2d 780 (8th Cir.), cert. denied *sub nom. Thompson v. United States*, 419 U.S. 825 (1974), holds only that defendants who had been granted transactional immunity for state grand jury proceedings could be prosecuted on federal charges if the federal prosecutors could show independent and untainted sources for their evidence. The federal officials testified that they had no access to nor knowledge of the state Grand Jury transcripts. They also introduced FBI reports and the federal Grand Jury minutes taken prior to defendants' state grand jury appearance to establish independent sources. Repetition of testimony was not involved since defendants had given no testimony in the interval between the state grand jury appearance and the federal criminal case.

In *United States v. Miranti*, 253 F.2d 135 (2nd Cir. 1958), defendants had never been granted immunity for their grand jury testimony and were therefore entitled to interpose the Fifth Amendment in subsequent proceedings where repetition of the earlier testimony was sought. The court held that Miranti's earlier testimony before the same grand jury did not constitute a waiver of the right to assert the privilege because the two grand jury proceedings were separate and independent.

In *United States v. Seiffert*, 501 F.2d 974 (5th Cir. 1974), the court held that the bankrupt's deposition, voluntarily given in connection with the bankruptcy proceedings he had voluntarily instituted, was not protected under the immunity provision of the former Bankruptcy Act, 11 U.S.C. §25(a)(10). The court found that the deposition was neither a continuation of the first meeting of creditors nor an examination under court order and, therefore, not an instance provided for by the Bankruptcy Act "in which testimony may be compelled in exchange for the statutory immunity." 501 F.2d at 981. The voluntary nature of Seiffert's testimony was determinative:

> In the case before us, there is no suggestion of personal testimonial compulsion directed toward Seiffert in the voluntary bankruptcy proceedings . . . We would, of course, have a different case if it were shown that compelled testimony led to the [incriminating evidence].

501 F.2d at 982.*

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* Reliance by respondent and the *en banc* opinion on the Comment, *Requiring Witnesses to Repeat Themselves*, 47 Tex. L. Rev. 266 (1969), is similarly misplaced. While the author suggests that requiring a witness to repeat earlier incriminating testimony may compel him to incriminate himself further because "reiteration adds to credibility," this is on the premise that neither testimony is given under a grant of

(Footnote continued on following page)

As Chief Judge Cummings points out, "[i]n contrast to these factually inapposite cases, Judge (now Justice) Stevens' strong dictum in *Patrick v. United States*, 524 F.2d 1109 (7th Cir. 1975) is directly on point." 661 F.2d at 1160. *See* Brief For The Petitioners, p. 22. Respondent concedes as much, lamely noting the *Patrick* Court's "hypothetical arguments should not be taken as a holding consistent with those of *Starkey* and *Fleischacker.*" Brief For Respondent, p. 34.

The statutory "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom" (406 U.S. at 460) is not limited to introduction of the immunized testimony itself (direct use) or the "fruits" of such testimony as a result of the prosecutor having had access to the immunized testimony (indirect use), as respondent suggests. The statute and this Court's holding in *Kastigar* proscribe *any derivative use* of the immune testimony! The prosecutor's burden of showing legitimate and independent sources is not limited to negation of taint; "rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460. It is inconceivable that a prosecutor, consistent with *Kastigar*, could satisfy this burden by reference to Conboy's civil deposition testimony which repeats verbatim or closely tracks his immunized testimony.

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* *continued*
immunity. The comment, written before enactment of the 1970 immunity statute, proposes amendment of Rule 37 of the Uniform Rules of Evidence "to provide that whenever a witness is compelled to testify in a subsequent proceeding on the basis of a prior incriminating disclosure, the testimony so given and the fruits of it will be inadmissible in a subsequent proceeding against the witness." *Id.* at 271. This is the very use and derivative use protection provided by the 1970 Act.

II.

Respondent next argues that Judge Singleton's Order compelling Conboy's testimony is invalid because it is based on a prospective application of the exclusionary rule and amounts to an impermissible judicial grant of immunity. Additionally, respondent urges the Order subjects Conboy to the additional hazards of perjury and waiver.

A.

The exclusionary rule operates to exclude evidence wrongfully compelled or obtained in violation of the defendant's constitutional rights. That rule cannot be relied on to compel testimony over a valid assertion of the Fifth Amendment. *Ellis v. United States*, 416 F.2d 791 (D.C. Cir. 1969). As the *Ellis* court held, "[a] trial judge cannot reject a witness' claim of privilege merely on the ground that the ruling cannot hurt the witness because it will establish an immunity from subsequent prosecution." 416 F.2d at 796. However, in rejecting Conboy's Fifth Amendment claims, Judge Singleton did not purport to rely in any way on the exclusionary rule. The thrust of his ruling was that as long as the examination was confined to his earlier immunized testimony, Conboy was protected. Order Adjudging Conboy in Civil Contempt, Appendix A to Petition, p. 68a. The immunity statute's coextensive protection against any use or derivative use of Conboy's immunized testimony supplanted Conboy's Fifth Amendment privilege. Similarly, the panel majority did not hold that regardless of the propriety of Conboy's claim of privilege, the deposition testimony must be excluded under the exclusionary rule. Rather, it concluded Conboy had no privilege to assert because his testimony was protected under the statute. 655 F.2d at 752 n.5.

Nor did the Eighth Circuit in *In re Order of Civil Contempt, Appeal of Carlos Lee Starkey*, 600 F.2d 1043 (8th Cir. 1979), rely on the exclusionary rule as justification for the order compelling testimony, as respondent suggests. *Starkey* did not find "that a subsequent application of the exclusionary rule to improperly compelled testimony was 'all [the protection] appellant is entitled to under 18 U.S.C. §6001.'" Brief For Respondent, p. 27. Respondent quotes out of context the court's distinction between the protection afforded by use and transactional immunity. *Starkey* explicitly held that the deposition testimony would be "tainted" by the federal grand jury testimony for which Starkey received "use" immunity pursuant to 18 U.S.C. §6001 *et seq.*:

> In this case, however, all parties had access to the grand jury transcript and appellee's attorney used the immunized testimony to question Starkey at the deposition. Many of the deposition questions were in the same sequence as the grand jury questions and numerous questions were taken verbatim from the grand jury transcript . . . In these circumstances, we find that the deposition testimony, as long as it is within the confines of the grand jury testimony, is "tainted" by the grand jury testimony.

600 F.2d 1046. Respondent acknowledges that the Second Circuit in *In re Corrugated Container Antitrust Litigation, Appeal of Philip L. Fleischacker*, 644 F.2d 70 (2nd Cir. 1981), rejected the notion that Judge Singleton in compelling Fleischacker's testimony was relying on the exclusionary rule and thereby granting *de facto* immunity. 644 F.2d at 78.

Maness v. Meyers, 419 U.S. 449 (1975), relied on by respondent and holding an attorney could not be found in contempt for advising his client in good faith to assert his Fifth Amendment privilege as grounds for refusing to produce admittedly incriminating documents, is inapposite. This is not a case of letting "the cat out

with no assurance whatever of putting it back". 419 U.S. at 463. The sweeping protection of the immunity statute assures that no use can be made of Conboy's compelled testimony, or any compelled repetition of that testimony, in a subsequent prosecution. The statute, not the exclusionary rule, provides the "absolutely reliable guarantee" that the prosecuting authority "will not use the testimony in any way at all in aid of prosecution of the witness". *Kastigar*, 406 U.S. at 471 (Marshall, J. dissenting). *Kastigar* so mandates.

On the other hand, Conboy has no constitutionally protected right to the further guarantee of transactional immunity. Conboy always theoretically remains open to prosecution, assuming the applicable statutes of limitation have not run. The fact that no government prosecutor is a party to this litigation is irrelevant. Judge Singleton's Order does not preclude the prosecutor, assuming a subsequent prosecution of Conboy, from showing that "the evidence [he] proposes to use is derived from a legitimate source wholly independent of the compelled testimony". *Kastigar*, 406 U.S. at 460. Nor does Judge Singleton's Order preclude the trial judge at such subsequent prosecution from ruling on the question of whether the prosecutor has satisfied his heavy burden of showing a legitimate and independent source. Judge Singleton's Order only determined that Conboy's deposition testimony, in the circumstances, would be a "tainted" source. Obviously, if this Court similarly determines that Conboy's civil deposition testimony is protected, that holding would be binding on all courts and dispositive of the taint issue in a subsequent prosecution. Any attempt by the prosecutor to rely on the deposition testimony as his source would be barred.

B.

Judge Singleton's Order did not amount to a judicial grant of immunity. The district court did not purport to

grant Conboy immunity for his deposition testimony. In overruling Conboy's Fifth Amendment claims and holding that his deposition testimony could not be used against him in a subsequent criminal prosecution because it would be derived from his previous immunized testimony, both the district court and the panel majority were merely interpreting the scope of protection of the statute and the original immunity grant. Their determination that the witness's protection derives from the original statutory immunity grant cannot be fairly characterized as either a *de facto* grant of immunity or a usurpation of the Justice Department's exclusive function to grant immunity, much less, "a grant of transactional immunity" by "economically motivated private civil litigants." Brief For Respondent, p. 36. In interpreting the scope of immunity protection both Courts were engaging in a legitimate exercise of judicial authority. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). Moreover, requiring a witness to answer questions a second time that were previously answered under a grant of immunity does not result in an expansion of the original immunity grant. *See* Brief For The Petitioners, pp. 19-23. In moving to compel Conboy's deposition testimony over his Fifth Amendment assertions, petitioners were attempting to secure important merit testimony in furtherance of prosecution of their antitrust actions alleging *per se* price fixing violations.

C.

The order compelling Conboy to repeat his immunized grand jury testimony does not expose him to additional hazards of self-incrimination. Respondent suggests that "a different or more expansive answer to an identical question" would be unprotected testimony available for use against Conboy in a subsequent prosecution. As support, respondent cites *United States v. Housand*, 550 F.2d

818 (2nd Cir.), *cert. denied*, 431 U.S. 970 (1977). In *Housand*, the Second Circuit held that the witness, Crisafi, could properly invoke the Fifth Amendment if his truthful trial testimony would reveal perjury in his prior immunized grand jury testimony. Conboy has never claimed that his deposition testimony might reveal perjury in his prior immunized testimony. Respondent's belated suggestion to the contrary is not supported by the record. The "additional jeopardy" of self-incrimination mentioned by Conboy's attorney to the district judge, was the possibility of Conboy "testifying in greater length and detail" and thereby straying beyond the confines of his immunized testimony. J.A. 43.* As previously pointed out, if Conboy at his deposition, newly recalled additional information not given in his immunized testimony, such information would be protected if *responsive* to the immunized questions. Similarly, details embraced within the immunized testimony would be protected as derivative of such testimony. *Fleischacker*, 644 F.2d at 78-80. Even an inconsistent answer would be protected, if the result of the witness's failure to fully or accurately recall at the time of his immunized testimony.**

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* *See also* Brief for *Amici Curiae*, p. 16, "[a]dmittedly, Mr. Conboy has never claimed his new testimony would reveal that his previous testimony was false."

** Respondent also contends that Conboy could be prosecuted under 18 U.S.C. §1623 (1976) for false declarations if his deposition answers are innocently inconsistent with his immunized testimony, without specification in the indictment as to which answer is false. Brief for Respondent, pp. 39-40. On the contrary, mere inconsistency in testimony is not sufficient to indict. The statute requires that the false declarations be "knowingly" made, that they be "inconsistent to the degree that one of them is necessarily false," and that they be "material to the point in question." It is a defense that "the defendant at the time he made each declaration believed the declaration was true." 18 U.S.C. §1623. *United States v. Slawik*, 548 F.2d 75, 83-85 (3rd Cir. 1977); H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970), 1970 U.S. Code Cong. & Admin. News, p. 4023.

There is no danger of Conboy waiving his Fifth Amendment rights unless he deliberately and intentionally volunteers incriminating information which is not responsive to questions asked during his immunized examination and repeated in his civil deposition, a waiver in no way compelled by the district court's order. *See* Brief For The Petitioners, pp. 23-25.

III.

Finally, respondent argues that if the deposition examination of Conboy is confined to a reiteration of his immunized testimony, this procedure will yield "a mere carbon copy" of the Grand Jury transcripts and be subject to the same admissibility objections because of lack of opportunity to cross-examine.* The assumption implicit in this statement is that defendants will be denied an opportunity to conduct meaningful cross-examination to test the accuracy and truthfulness of Conboy's direct testimony. Thus, the *en banc* majority states:

> Plaintiffs have stated that they do not intend to ask any questions beyond those asked in the earlier transcripts. It is undisputed that Conboy has, and will exercise, his Fifth Amendment privilege to refuse to answer any such questions. Defendants will not, therefore, have any real opportunity to cross-examine at the deposition.

Conboy, 661 F.2d at 1159. While petitioners intend to limit their direct examination to essentially a repetition of Conboy's immunized testimony, it does not follow that defendants will be denied "any real opportunity to cross-examine" at the deposition, or that Conboy will automatically invoke the Fifth Amendment to block such cross-examination. Defendants would be entitled to test

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* Respondent refers to the Brief of *Amicus Curiae* The Mead Corporation for fuller discussion of this issue.

the accuracy and truthfulness of Conboy's repeated immunized testimony without going beyond the confines of that testimony. If the witness refused to answer on Fifth Amendment grounds they would similarly be entitled to secure an order compelling such testimony.

Amicus Curiae Mead suggests that "should this Court adopt a ruling permitting deponents to be questioned concerning matters covered in their prior immunized testimony, the court should ensure that the scope of permissible questioning is broad enough to encompass an effective cross-examination." Brief of *Amicus Curiae* The Mead Corporation, p. 14. The leading case of *United States v. Cardillo*, 316 F.2d 606 (2nd Cir. 1963), provides an appropriate standard for determining the scope of permissible cross-examination.

> In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. [citations omitted] On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part . . . [citations omitted]

316 F.2d at 611.

Should Conboy attempt to invoke the privilege to preclude "inquiry into the details of his direct testimony," the appropriate remedy is for defendants to move to compel rather than striking his testimony in whole or part. Such examination as to details is clearly embraced within the prior immunized testimony and, therefore, protected. On the other hand, any attempt to ask incriminating questions beyond the confines of, or collateral to, the immunized grand jury testimony in order to invoke genuine Fifth Amendment assertions by the witness would not be a denial of meaningful cross-examination or grounds for striking the witness's direct testimony. *Cardillo*, 316 F.2d at 611. See also, *Fountain v. United States*, 384 F.2d 624, 628 (5th Cir. 1968).

CONCLUSION

For the reasons stated in the Brief For The Petitioners and this Reply Brief, the opinion of the *en banc* majority should be reversed.

Respectfully submitted,

FRANCIS J. MCCONNELL
(Counsel of Record)
EDWARD F. RUBERRY
WILLIAM R. JANSEN
135 South LaSalle Street
Suite 4310
Chicago, Illinois 60603
(312) 726-9131
Attorneys for the Petitioners

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Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PILLSBURY COMPANY, ET AL.,

Petitioners,

v.

JOHN CONBOY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF PHILIP L. BARNUM, ROBERT E. LINDEMAN, WARREN F. FRYBURG AND LEROY W. STALDER FOR LEAVE TO FILE A BRIEF AMICI CURIAE
And
BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

JERRY G. HILL
Counsel of Record for Witnesses-Amici Curiae Philip L. Barnum, Robert E. Lindeman, Warren F. Fryburg and Leroy W. Stalder
1200 South Tower
Pennzoil Place
Houston, Texas 77002
(713) 228-1451

FRANK V. GHISELLI, JR.
BERTRAND C. MOSER
HILL & GHISELLI

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MOTION OF PHILIP L. BARNUM, ROBERT E. LINDEMAN, WARREN F. FRYBURG AND LEROY W. STALDER FOR LEAVE TO FILE A BRIEF AMICI CURIAE

Philip L. Barnum, Robert E. Lindeman, Warren F. Fryburg, and Leroy W. Stalder respectfully move the Court for leave to file herein the accompanying brief *amici curiae* in support of the position of respondent, John Conboy. The basis for this motion is the following:

1. The consent of respondent to the filing of such a brief has been obtained. The consent of petitioners was requested but refused.

2. The petition for writ of certiorari of The Pillsbury Company, et al, opt-out plaintiffs in M.D.L. 310, *In re Corrugated Container Antitrust Litigation*, was granted on January 11, 1982. The question presented of whether a witness may assert

the Fifth Amendment in a civil deposition in response to questions taken from prior immunized grand jury transcripts is of vital importance to Messrs. Barnum, Lindeman, Fryburg and Stalder.

3. On January 25, 1980, the District Court in M.D.L. 310 ordered the release to the plaintiffs of certain portions of the grand jury and interview transcripts of respondent and Messrs. Barnum, Lindeman, Fryburg and Stalder. These transcripts were then utilized by the opt-out plaintiffs to formulate the deposition questions underlying this appeal. On February 24, 1982, respondent, together with Messrs. Barnum, Lindeman, Fryburg and Stalder, and others, filed a petition for writ of certiorari, No. 81-1583, relating to the threshold question of whether the District Court was correct in releasing the transcripts.

4. The position of these individuals is exactly that of respondent herein. Respondent asserted the Fifth Amendment at deposition when asked questions taken from his immunized grand jury transcript. Messrs. Barnum, Lindeman and Fryburg did the same. Mr. Stalder was asked no substantive questions at deposition, but advised counsel he would likewise assert the Fifth Amendment in the event his deposition were to be resumed.

5. The depositions of Messrs. Barnum, Lindeman, Fryburg and Stalder were taken in the Seventh Circuit before the deposition of respondent and the decision in *In re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 661 F.2d 1145 (7th Cir. 1981)(*en banc*). A reversal of the *Conboy* decision could result in these individuals being ordered to testify from their grand jury transcripts over their Fifth Amendment objections.

6. Messrs. Barnum, Lindeman, Fryburg and Stalder thus have a very real and direct interest in the outcome of this case. These individuals therefore feel it necessary to present their views to this Court. They believe, possibly because of emphasis

on other points, that certain principles of constitutional law may not be adequately developed and presented by the parties.

For the foregoing reasons, Messrs. Barnum, Lindeman, Fryburg and Stalder respectfully ask that they be granted leave to file a brief *amici curiae* in this matter.

Respectfully submitted,

JERRY G. HILL
Counsel of Record for Witnesses-Amici Curiae Philip L. Barnum, Robert E. Lindeman, Warren F. Fryburg and Leroy W. Stalder
1200 South Tower
Pennzoil Place
Houston, Texas 77002
(713) 228-1451

FRANK V. GHISELLI, JR.
BERTRAND C. MOSER
HILL & GHISELLI

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BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT

As *amici curiae*, Philip L. Barnum, Warren F. Fryburg, Robert E. Lindeman and Leroy W. Stalder, submit this brief urging this Court to affirm the *en banc* decision of the Seventh Circuit holding that respondent, John Conboy, properly asserted the Fifth Amendment in response to questions read verbatim from or closely tracking transcripts of his previously immunized testimony at a Justice Department interview and before the grand jury. *In re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 661 F.2d 1145 (7th Cir. 1981). The District Court, John V. Singleton, had held Mr. Conboy in civil contempt for asserting the Fifth Amendment.

The Seventh Circuit, after considerable analysis, determined that Mr. Conboy faced a risk of prosecution if his deposition answers could be used against him. 661 F.2d at 1150-53. The Seventh Circuit also held, in passing, that Mr. Conboy's answers to the deposition questions might reveal that he was engaged in criminal activity. 661 F.2d at 1149, n.7. The petitioners' brief challenges neither of these conclusions. Thus the issue here is reduced to whether the prior immunity grants would taint the deposition testimony and make it unuseable against Mr. Conboy in any future prosecution. Judge Singleton relied on *In re Corrugated Container Antitrust Litigation, Appeal of Phillip Fleischacker*, 644 F.2d 70 (2d Cir. 1981), and *In re Order of Civil Contempt, Appeal of Carlos Lee Starkey*, 600 F.2d 1043 (8th Cir. 1979) to hold that the prior immunity supplanted the Fifth Amendment in the civil deposition.[1] The *en banc* Court below and the Fifth Circuit in *In re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086 (5th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) held to the

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[1] Arguably, the Eighth Circuit did not make this holding in *Starkey*. There, the State of Arkansas filed a civil antitrust suit against several dairies. Starkey was an employee of one of the milk companies and had testified previously before a federal grand jury under an immunity order. In the civil trial, the State of Arkansas attempted to take Starkey's deposition. He refused to answer on the ground of the Fifth Amendment. The Attorney General of Arkansas represented to the Court that it would consider any deposition testimony of Starkey to be derived from his grand jury testimony. The Attorney General could thereafter never be heard to deny the testimony was tainted. Thus it is questionable whether the Eighth Circuit in *Starkey* held that Starkey's deposition testimony would be tainted by his previous testimony. Rather, the Eighth Circuit seemed to hold that the in-court representation of the Attorney General that he would consider the deposition to be tainted was in itself a new grant of immunity. *Accord, In re Corrugated Container Antitrust Litigation, Appeal of Charles J. Franey*, 620 F.2d 1086, 1092, n.5 (5th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). But in the later case of *Little Rock School District* v. *Borden, Inc.*, 632 F.2d 700 (8th Cir. 1980), the Eighth Circuit without doubt held consistently with the Second Circuit in *Fleischacker*.

contrary. An understanding of the concept of immunity will show that the Fifth and Seventh Circuits are correct.

INTEREST OF AMICI CURIAE

The interest of Messrs. Barnum, Fryburg, Lindeman and Stalder as *amici curiae*, is set forth in their motion for leave to file this brief *amici curiae*, to which motion this brief is attached.

SUMMARY OF ARGUMENT

Use immunity protects only the source of incriminating testimony, not the substance. Each statement a witness makes, even if identical to one made previously under immunity, is a possible source of incrimination. Although deposition questions may be derived from previous immunized proceedings, the answers must be derived from a witness' memory. The Seventh Circuit properly recognized that questions do not incriminate. Answers do.

The Government also recognized that each statement a witness makes creates a new source. It sought immunity for its witnesses when they testified before the grand jury and again when they testified at trial. A witness could not rely when he testified at trial on the immunity granted him when he testified before the grand jury. Similarly, a witness cannot rely in a civil deposition on the immunity granted him when he testified before the grand jury.

To uphold the trial Court's order compelling John Conboy to answer questions from his immunized testimony is to authorize widespread creations of judicial immunity. Simply by releasing immunized interview and grand jury materials, a district court could compel a witness to answer questions to which the witness could otherwise claim his Fifth Amendment privilege. These answers would then be immunized from future use by the Government.

The trial Court's order also would allow petitioners to ask questions that the Government, perhaps intentionally, did not ask. The answers to these questions would be immunized as well. Furthermore, the defendants may cross-examine. If the District Court orders the witness to give answers to the defendants' questions, these answers too would be immunized.

In addition, if the witness gives deposition answers which expand upon his immunized answers, the Government would not be permitted to use any new information thereby elicited. Yet these new answers could in no way be considered information derived from the immunity grants.

The District Court's order has the effect of the petitioners and not the Government seeking immunity. The order does not merely determine the scope of the protection afforded by immunity, as petitioners argue. A court can make such a determination only in an action to which the Government is a party and seeks to introduce evidence against a formerly immunized witness.

Finally, the District Court's order could unfairly jeopardize Mr. Conboy in the event his deposition answers differ from his previous immunized answers. An alert prosecutor could charge Mr. Conboy with committing perjury in either his grand jury testimony or his deposition. A witness could be wholly innocent, but any deviation in answers might subject him to a prosecution for perjury. The Fifth Amendment protects him from this jeopardy.

ARGUMENT

I. THE SEVENTH CIRCUIT CORRECTLY CONSTRUED *KASTIGAR* v. *UNITED STATES.*

Mr. Conboy was granted immunity pursuant to 18 U.S.C. §§6001-6005, which were part of the Organized Crime Control Act of 1970. In *Kastigar* v. *United States*, 406 U.S. 441 (1972),

this Court analyzed the historical development of immunity statutes and the scope of the 1970 Act. The Court noted that immunity is of two types — use and transactional. The 1970 Act provides use immunity. The prosecutor is prohibited from employing "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. §6002. Prior to the 1970 Act, the federal immunity law had provided for transactional immunity, which meant that no immunized witness could be prosecuted "on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise." *Kastigar, supra,* 406 U.S. at 451.

At issue in *Kastigar* was the constitutionality of the 1970 Act. The Court said that the "constitutional inquiry . . . is whether the immunity granted under the statute is coextensive with the scope of the privilege (against self-incrimination)." *Kastigar, supra,* 406 U.S. at 449 (footnote omitted). The Court held that the 1970 Act provided the same protection as the Fifth Amendment and therefore validly supplanted the privilege. On the other hand, transactional immunity would provide the witness with more protection than the Fifth Amendment. This the Constitution does not require. The Fifth Amendment provides "neither pardon nor amnesty." *Kastigar, supra,* 406 U.S. at 461. It does not prevent the prosecutor from prosecuting. It only limits his sources of evidence. Thus, under the 1970 Act, a prosecutor must show that his evidence against an immunized witness is not tainted, that is, not derived directly or indirectly from the testimony the witness gave under immunity. If the Government can meet this burden, it can prosecute the immunized witness for the crimes discussed in his immunized testimony. *Kastigar, supra,* 406 U.S. at 460.

From *Kastigar* one vital principle emerges — use immunity protects the source of the testimony; transactional immunity protects the substance. Each time a witness makes a statement, he creates a source. "If Conboy answers the proposed questions, those answers necessarily create a new source of evidence." *Conboy, supra,* 661 F.2d at 1155. Even if the evidence obtained under use immunity is identical to that given by the same witness on another occasion not under immunity, the Government may prosecute on the basis of the rendition not given pursuant to immunity. See *Conboy, supra,* 661 F.2d at 1155; *United States* v. *Kuehn,* 562 F.2d 427 (7th Cir. 1977).

The principle of *Kastigar* can best be illustrated by the Government's practice here. It sought immunity for its witnesses prior to the time they testified before the grand jury and again before they testified at trial. The prosecutor who questioned a witness at trial would have been hard-pressed to contend that he had not read the witness' grand jury transcript and did not use it to shape the trial interrogation. The Government properly recognized that a witness' grand jury immunity did not protect him at trial.

Similarly, the Government promised not to prosecute Mr. Conboy based upon information gained in his interview and sought a formal grant of immunity for his grand jury testimony.[2] The Government recognized, as did the Seventh Circuit *en banc* majority, that questions do not incriminate. Only answers do.

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[2] The panel majority attempted to discount the second grant of immunity by saying that perhaps "the prosecutor wished to ask questions before the grand jury that were beyond the scope of the Justice Department interview." *In re Corrugated Container Antitrust Litigation, Appeal of John Conboy,* 655 F.2d 748, 753, n. 8 (7th Cir. 1981) (panel). Perhaps so. It is irrefutable, however, that the prosecutor would rely heavily on the interview to formulate the grand jury questions. The grand jury questions still would be largely derived from the prosecutor's knowledge of the interview. No second grant of immunity would be necessary if "derived use" means that the questions are derived from previously immunized testimony.

In a deposition, Mr. Conboy must answer the questions based on his present recollection, not on what a transcript says. The source of his answers is his memory, not his transcript. It is therefore irrelevant if "a transcript of a witness' immunized testimony constitutes the source of questions posed to the same witness in a proceeding." *Fleischacker, supra,* 644 F.2d at 77. The questions may be, in the words of Section 6002, "information directly or indirectly derived from the prior proceedings," but the answers are not. By recognizing that the deposition answers are a source distinct from the immunized answers, the Seventh Circuit *en banc* correctly followed the teaching of *Kastigar.*

II. THE DISTRICT COURT'S ORDER, IF UPHELD, WOULD PERMIT A WIDESPREAD CREATION OF JUDICIAL IMMUNITY.

A. The District Court Was Wrong By Ensuring "Taint" In Releasing The Interview And Grand Jury Transcripts.

The initiation of immunity proceedings is strictly a function of the Executive Department. A court cannot grant immunity on its own motion. See *Conboy, supra,* 661 F.2d at 1157; *In re Daley,* 549 F.2d 469 (7th Cir. 1977), *cert. denied,* 434 U.S. 829 (1977). Judge Singleton's order compelling Mr. Conboy to testify, however, would allow widespread grants of immunity not by the executive, but by the judiciary.

Many questions in Mr. Conboy's interview and grand jury transcripts are obvious ones that any civil antitrust plaintiff would explore. For example, Alton Box Board is a well known competitor of Mr. Conboy's former employer, Weyerhaeuser Company. Thus the question cited in footnote 2 of the *Conboy en banc* opinion, 661 F.2d at 1148, "Who did you have price communications with at Alton Box Board?" is not one which

petitioners could devise only because of their access to Mr. Conboy's prior testimony. If petitioners had no access to the prior testimony, Mr. Conboy could undoubtedly invoke the Fifth Amendment when the question was asked. Petitioners nonetheless argue that the deposition answers would be immunized because petitioners would be reading from the transcripts. Through this line of reasoning, "the court could ensure 'taint', and thus compel the witness to answer, by seeing to it — as the court did here — that the questioner had a transcript of the immunized testimony on which to 'base' his questions." *Franey, supra*, 620 F.2d at 1093. By releasing the transcripts, a court and not the Attorney General determines how much otherwise privileged testimony a witness must give, thus undermining the basic concept that prosecution and immunity are decisions left solely to the executive.

B. The District Court Was Wrong In Ordering Respondent To Answer Questions From The Transcripts And Other Related Questions.

Judge Singleton's order does not define exactly what deposition questions petitioners may ask. But Judge Singleton's actions in this litigation with respect to other witnesses in the same position as Mr. Conboy amply demonstrate that the District Court meant to allow deposition questions other than verbatim renditions of questions previously asked by the Government. In Pretrial Order No. 37 in the class case dealing with two Mead Corporation employees, Richard Hermann and Joseph Kurpiel, Judge Singleton ordered the witnesses to answer all questions previously answered "and, further, to answer other questions relating to the same substantive matters testified to in other such grants of immunity." In Pretrial Order No. 40, vacated by the Fifth Circuit in *Franey*, Judge Singleton held Charles Franey, another Mead Corporation employee, in contempt for not answering deposition questions taken verbatim from the transcripts as well as questions "closely related in subject matter."

Pretrial Order No. 44 held MacMillan Bloedel employee Alex Hopkins in contempt for failing to answer questions "derived from the same substantive matters as covered in his immunized testimony."[3] Similarly, the Second Circuit held that Mr. Fleischacker must answer questions not only taken verbatim from his transcript but also "questions (that) concerned specific subjects that actually were touched upon by questions appearing in the transcript of the immunized testimony." *Fleischacker, supra,* 644 F.2d at 79.

Each of these formulations permits petitioners to ask questions which the Government did not. The Government may not have asked related or follow-up questions because it did not want to immunize the answers.[4] If petitioners are now allowed to ask follow-up questions, the District Court and not the Government will have made the decision to grant immunity as to these answers. Furthermore, if Mr. Conboy's testimony mentions facts not discussed in his prior testimony, who is to decide how deeply petitioners may probe? The Court, not the Attorney General. Every time the Court decides that the petitioners may ask a question, it is creating immunity.

Cross-examination presents a similar problem. If other defendants ask Mr. Conboy incriminating questions, the Court must decide whether these questions are sufficiently related to the transcript questions. If the Court decides the questions may not be asked, the deposition may be inadmissible at trial. If the Court decides the questions are related, the Court has immunized the answers.

Petitioners argue defendants would have nothing to gain by asking Mr. Conboy incriminating questions. Thus, petitioners urge, any effort by defendants to ask incriminating questions

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[3] In the companion case in *Franey*, the Fifth Circuit vacated Pretrial Order No. 44.

[4] This danger was noted by the Second Circuit. See *Fleischacker, supra,* 644 F.2d at 78-79.

would be seen as an "obvious ploy." (Brief of Petitioners, p. 27) Logic, however, does not support petitioners' position. Mr. Conboy's deposition answers could very well be efforts to exculpate himself and his employer and to inculpate other defendants. Those other defendants might attempt to impeach that testimony by a showing that Mr. Conboy was indeed guilty of antitrust violations. If Mr. Conboy asserted the Fifth Amendment to these questions, defendants would be denied meaningful cross-examination.

C. The District Court Was Wrong In Assuming That A Witness' Deposition Answers Will Always Be The Same As His Prior Immunized Answers.

Judge Singleton has assumed throughout this litigation that a witness' answers to the deposition questions will be identical to his immunized answers. In Pretrial Order No. 40, Judge Singleton framed the issue as "whether that (previously granted) use immunity will be nullified *if the witness now repeats his testimony at deposition.*" (Emphasis added). At a hearing which led to the contempt order against Messrs. Hermann and Kurpiel, Judge Singleton said:

> "I would assume that if I were Mr. Kurpiel's lawyer, I would have sitting before Mr. Kurpiel his grand jury transcript and I would instruct him to read it."

Of course if the deposition questions were different from the transcript questions, it would not avail Mr. Conboy to read the answers from the transcript. But even if the questions are identical, Mr. Conboy cannot simply read his prior answers. Mr. Conboy would be sworn to tell the truth as he knows it on the date of the deposition, not as he knew it four years ago in the interview or before the grand jury. Assume that Mr. Conboy had testified in 1978 that he had exchanged price information with X and Y. In his deposition Mr. Conboy remembers that he also discussed prices with Z, a person previously unknown to the Government.

Since Z was never mentioned in any prior Government interrogation, Z is hardly "information derived from such immunized testimony." The Government could use Z as a source for a criminal prosecution against Mr. Conboy and not violate the doctrine of use immunity. Yet Judge Singleton would have immunized this new source of evidence against Mr. Conboy in a proceeding in which the Government would not have been a party. It was this possibility of new answers that led the District Court for the Northern District of Illinois, the first court to consider the issue, to rule contrary to Judge Singleton:

> "Additionally weighing against plaintiffs' attenuated 'taint' theory are the fundamental policies, already discussed, which underlie 18 U.S.C. §6002. Barring this Court's order of a release of the immunized grand jury testimony to the plaintiffs prior to any compelled deposition, we could not prevent the civil depositions from covering topics and incidents far beyond the scope of the grand jury testimony. *Even assuming that we ordered a release of the prior immunized testimony and confined plaintiffs to asking questions which were actually asked under the grand jury immunity grant, we could not prevent the deponent from testifying at greater length and detail about potentially incriminating transactions.*"

In re Folding Carton Antitrust Litigation, 465 F.Supp. 618, 629 (N.D. Ill. 1979), *reversed on other grounds*, 609 F.2d 867 (7th Cir. 1979) (emphasis added).

D. The District Court's Order Cannot Be Justified As An Interpretation Of A Prior Grant Of Immunity.

No deposition answer under Judge Singleton's order could be used by the Government in a future prosecution. Yet each deposition answer so immunized comes at the behest of a private party, not the Government.[5] Petitioners urge, however, that

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[5] Petitioners accurately point out that the "United States Attorney in the instant actions declined to authorize immunity grants in connection with civil depositions" (Brief of Petitioners, p. 9, n. 7). The

Judge Singleton is not granting immunity. Rather, he is interpreting the scope of a previous immunity grant and deciding if the deposition answers are tainted by that prior immunity. *Kastigar* makes clear, however, that the Government must be a party to the proceeding. The Government has the burden in a future prosecution to show that its evidence against a formerly immunized witness "is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460. Only the Government has this burden, and only the Government can discharge it.

For the proposition that the District Court is merely interpreting an immunity grant, petitioners and Judge Johnson dissenting in *Franey, supra,* cite *Starkey, supra,* and *Patrick* v. *United States,* 524 F.2d 1109 (7th Cir. 1975). Each case is inapposite. In each case the issue before the Court was whether the Government could prove in a subsequent proceeding that its evidence against the witness was untainted. This is as *Kastigar* intended. Here, however, the Government is not involved. A private party and not the Government is asking the Court to determine what is a derived use of immunized testimony. *Kastigar* clearly holds that this is not within the power of the judiciary under 18 U.S.C. §6002.

In the only totally private litigation in which a party asked the Court to rule that previously immunized testimony would protect the witness in a subsequent proceeding, the Court held it would not make such a prospective determination of taint. *Folding Carton, supra,* 465 F.Supp. at 629. The District Court decision in *Folding Carton* was rendered in the Seventh Circuit and came four years after *Patrick.* If the District Court in *Folding*

United States Attorney did not do so because he had no power to do so. The Government cannot obtain immunity for witnesses in private litigation. *United States* v. *Dunham Concrete Products, Inc.* 475 F.2d 1241 (5th Cir. 1973), *cert. denied,* 414 U.S. 832 (1973).

Carton believed *Patrick* compelled the result urged by petitioners, the District Court could not have ruled as it did.

III. THE DISTRICT COURT'S ORDER CREATES THE POSSIBILITY OF A PROSECUTION OF THE RESPONDENT FOR PERJURY.

Judge Singleton's order is more than just a threat to the separation of powers implicit in the concept of immunity. The possibility that deposition answers may differ from immunized answers also could give rise to a prosecution of Mr. Conboy for perjury.

In *United States* v. *Apfelbaum*, 445 U.S. 115 (1980), this Court held that a witness may be prosecuted for perjurious testimony given under immunity. And a witness is entitled to invoke the Fifth Amendment in a subsequent proceeding if his testimony will reveal perjury in a prior immunized proceeding. See *United States* v. *Housand*, 550 F.2d 818 (2d Cir. 1977); *Fleischacker*, *supra*, 644 F.2d at 75, n.7. Thus if a witness' new testimony differs from his old, a prosecutor may attempt to use the new testimony to show that the immunized testimony was false.

Admittedly, Mr. Conboy has never claimed his new testimony would reveal that his previous testimony was false. However, if his present recollection at deposition is different from his past recollection, a prosecutor may well use the immunized testimony to show perjury at the deposition or the deposition testimony to show perjury at the immunized testimony. The deviation could trigger an investigation into whether one version or the other was knowingly false. "This is a reasonable cause for apprehension and supports the claim of privilege." *Housand*, *supra*, 550 F.2d at 823; see also *Conboy*, *supra*, 661 F.2d at 1158. Mr. Conboy may claim that the deviation was innocent. Unfortunately, a prosecutor or jury may not agree.

CONCLUSION

The District Court's order ensures the tainting of deposition answers in a proceeding not involving the Government. The new answers are not "information derived directly or indirectly from immunized testimony." The answers are derived from Mr. Conboy's memory. The answers, nevertheless, would be immunized at the direction of the Court and not of the prosecutor. This violation of the separation of powers countenanced by the District Court must be overturned.

Therefore, the decision of the *en banc* Seventh Circuit should be affirmed.

Respectfully submitted,

JERRY G. HILL
Counsel of Record for Witnesses-Amici Curiae Philip L. Barnum, Robert E. Lindeman, Warren F. Fryburg and Leroy W. Stalder
1200 South Tower
Pennzoil Place
Houston, Texas 77002
(713) 228-1451

FRANK V. GHISELLI, JR.
BERTRAND C. MOSER
HILL & GHISELLI

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Amicus Brief

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

APPEAL OF: JOHN CONBOY,

THE PILLSBURY COMPANY, ET AL., OPT-OUT PLAINTIFFS,
Petitioners,

v.

JOHN CONBOY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION OF THE MEAD CORPORATION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE MEAD CORPORATION

HAROLD F. BAKER
ALAN WISEMAN
ANN I. KILLILEA
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for
Defendant-Amicus Curiae
The Mead Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF THE MEAD CORPORATION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

The Mead Corporation [1] ("Mead"), through undersigned counsel and pursuant to Rule 36 of the Rules of the

[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court, as amended, the following entities are subsidiaries and affiliates of The Mead Corporation: Altonaer-Wellpappenfabrik G.m.b.H.; British Columbia Forest Products Ltd.; Brunswick Pulp & Paper Co.; Europapel, S.A.; Graficarton, S.A.; Georgia Kraft Company; Gulf Supply Latina; Harima M.I.D.; Kraft Land Services, Inc.; Northwood Forest Industries Ltd.; Northwood Panelboard Company; Packagemaster Limited; Schoeller Photo Papers, Inc.; Schoeller Technical Papers, Inc.; Schoeller Technical Papers; Seaboard Paper Company; Mead Chemicals, Inc.; Mead-Emballage, S.A.; Mead Imballagi, S.p.A.; Mead-Toppan Company, Ltd.; Mead Verpackung G.m.b.H.; and Mead Verpakking B.V.

United States Supreme Court, moves the Court for permission to file a brief amicus curiae in *The Pillsbury Company, et al., Opt-Out Plaintiffs* v. *John Conboy*, No. 81-825. Grounds for this motion are:

1. This Court granted the petition for certiorari of The Pillsbury Company, et al., the opt-out plaintiffs in the *Corrugated Container Litigation*, M.D.L. 310, concerning the issue of whether a witness may assert the fifth amendment in a civil deposition in response to questions taken from prior immunized grand jury testimony.

2. Mead is one of 37 corrugated container manufacturers named as defendants in one or more of over 60 treble damage antitrust class and nonclass ("opt-out") actions alleging a nationwide conspiracy to fix the prices of corrugated containers and sheets. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.)

3. Mead is the only defendant which is litigating the class action. No judgment has been entered in the class case against Mead, nor is one expected for many months because plaintiffs are currently engaged in attempting to cure their failure of proof of damages. Mead has a legitimate and vital interest in the issues presented here. *The Employers' Liability Cases*, 207 U.S. 463 (1908); *Florida* v. *Georgia*, 58 U.S. (17 How.) 478 (1855). In the course of the class action litigation, a number of witnesses asserted the fifth amendment in depositions in response to questions derived from grand jury testimony. In a number of instances, the district court did not evaluate whether the fifth amendment was properly asserted by non-party witnesses. At the class trial, the district court erroneously permitted class plaintiffs to introduce as evidence the fact of the fifth amendment assertions by non-party witnesses, as well as their uncross-examined grand jury testimony. This Court's ruling in this appeal may impact on the class action litigation.

4. Mead and others filed a petition for writ of certiorari on February 24, 1982, No. 81-1583, relating to the

threshold question of whether the grand jury transcripts were properly produced under this Court's holding in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), and in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). The position taken by petitioner The Pillsbury Company in its case is that Conboy should be required to answer questions taken from grand jury testimony of Conboy. The effect of what Pillsbury seeks is for the district court to ensure "taint" by providing to Pillsbury a transcript of the immunized testimony on which to base its questions and then bootstrap the argument that the fifth amendment was improperly asserted. *See, e.g., In re Corrugated Container Antitrust Litigation, Appeal of Franey*, 620 F.2d 1086, 1093 (5th Cir. 1980), *cert. denied sub nom. Adams Extract Co.* v. *Franey*, 449 U.S. 1102 (1981). If the grand jury transcript, however, was improperly produced, then there is no basis for Pillsbury to compel Conboy to testify.

5. Pillsbury has sought to frame the issue before the Court in very narrow terms—that Conboy should be required to answer verbatim questions taken from his grand jury testimony. The issue as drawn, however, is too narrow: defendants have a right to cross-examine a witness. To compel Conboy to testify in response to only grand jury testimony would deny defendants their due process rights to cross-examine a witness.

6. Since the outcome of this Court's decision may impact upon the class litigation, Mead has a legitimate and vital interest in the appeal before this Court.

7. Mead believes the arguments to be presented on its behalf to the Court are material and germane to consideration of the important issue of the assertion of the fifth amendment in a deposition in response to questions taken from grand jury testimony, and respectfully submits that its arguments should be presented to and considered by the Court.

8. Mead has been unable to obtain the consent of all parties involved in *The Pillsbury Company, et al., Opt-*

Out Plaintiffs v. *John Conboy* to the filing of an amicus curiae brief, thus necessitating this motion.

For the reasons stated above, The Mead Corporation moves the Court for permission to file a brief amicus curiae in this matter.

Respectfully submitted,

HAROLD F. BAKER
ALAN WISEMAN
ANN I. KILLILEA
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for
Defendant-Amicus Curiae
The Mead Corporation

Dated: February 25, 1982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-825

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

APPEAL OF: JOHN CONBOY,

THE PILLSBURY COMPANY, ET AL., OPT-OUT PLAINTIFFS,
Petitioners,

v.

JOHN CONBOY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE THE MEAD CORPORATION

The Mead Corporation ("Mead") submits this brief as amicus curiae setting forth a position independent of either party. This Court is being asked by the parties to determine whether petitioner The Pillsbury Company can properly ask any question to respondent Conboy which is derived from Conboy's grand jury transcript. The issue of whether Pillsbury and other plaintiffs properly obtained grand jury transcripts of Conboy and others is the subject of a separate petition for certiorari, *The Mead Corporation, et al.* v. *Adams Extract Co., et al.*, No. 81-1583, which was filed on February 24, 1982.

Obviously, if Pillsbury improperly received Conboy's grand jury transcript, then there is no basis for reviewing whether Conboy properly asserted the fifth amendment in deposition.

Mead urges the Court that the district court failed to develop a proper record upon which it could determine that Conboy did not properly assert the fifth amendment. Mead takes no position as to whether or not the fifth amendment was properly asserted. However, if the Court should decide that a witness can be required to respond to questions taken from grand jury testimony, then Mead urges the Court to consider the extent to which cross-examination can be permitted. Absent the right of cross-examination, a defendant will be denied its due process rights.

INTEREST OF AMICUS CURIAE

Mead is one of 37 corrugated container manufacturers named as defendants in over 60 treble damage antitrust class and nonclass actions alleging a nationwide conspiracy to fix the prices of corrugated containers and sheets. *In re Corrugated Container Antitrust Litigation*, M.D.L. 310 (S.D. Tex.).

Mead is the only defendant which has not settled the class action litigation. The issues raised in this appeal may impact on the class case since similar instances of fifth amendment assertions in depositions by non-party witnesses occurred. Thus, Mead has a legitimate and vital interest in this appeal and in informing this Court of matters impinging upon the issues to be decided by this Court.

During the trial of the class action, plaintiffs offered into evidence, over Mead's objection, assertions of the fifth amendment and grand jury testimony of non-party witnesses. The Court's ruling on the instant appeal may well impact on the district court's rulings in the class case.

Mead and numerous grand jury witnesses filed a petition for writ of certiorari on February 24, 1982 relating to the threshold question of whether the grand jury transcripts were properly produced. If they were not, then obviously it was improper for Pillsbury to ask questions from them to Conboy.

In the class action litigation, a number of non-party witnesses were asked questions from grand jury transcripts. Some witnesses asserted the fifth amendment both to those questions as well as to questions asked on cross-examination by Mead. This right of cross-examination cannot be hampered by the overly restrictive ruling proposed by the petitioners here; that is, that only those answers to questions taken "verbatim or closely tracking" prior immunized testimony are tainted by the prior grant of immunity and, therefore, cannot be used against him in a subsequent prosecution. Rather, this Court, in deciding the legitimacy of a deponent's fifth amendment assertions must consider the effect of its ruling on the defendants' right to conduct a full cross-examination of that deponent.

As a civil defendant facing these issues, therefore, Mead has a unique and important interest in this appeal. That interest is that it seeks to protect its right to cross-examine a deponent, not only for the purposes of discovery, but also to protect its due process right to cross-examine testimony that may be presented at trial.

SUMMARY OF ARGUMENT

While Mead takes no position as to whether Conboy properly asserted the fifth amendment, it is apparent that the district court did not make an adequate record to justify its order of contempt. The district court failed to follow proper procedures to review the adequacy of the fifth amendment assertion. It did not review particularized questions asked the witness nor did it properly assess the risk of prosecution.

Moreover, petitioners have attempted to draw the issue too narrowly. Grand jury testimony is unreliable and inadmissible as substantive evidence. Depositions are taken to obtain information not only for discovery purposes, but also to be used as evidence at trial. If only grand jury questions are asked, no new information is obtained for discovery purposes. If no cross-examination is permitted, then such questions do not result in admissible evidence.

The due process right of cross-examination is a vital safeguard in our judicial system. Because Conboy's immunized testimony was given during an interview with Justice Department officials and later to the grand jury, the defendants had no opportunity for cross-examination at that time. The deposition questions, therefore, can only be permitted if the Court determines that a deponent must also respond to cross-examination.

If this Court adopts a rule resembling the Second Circuit's decision in *In re Corrugated Container Antitrust Litigation, Appeal of Fleischacker*, 644 F.2d 70 (2d Cir. 1981) (hereinafter cited as *Fleischacker*), the defendant's right to cross-examine the deponent, in effect, will be nullified. In *Fleischacker*, the court ruled that the deponent could be compelled to respond to questions read verbatim or closely tracking his immunized testimony. The Second Circuit purposefully narrowed the scope of examination to questions "concerning specific subjects that actually were touched upon by questions appearing in the transcript of the immunized testimony." 644 F.2d at 79.

In *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979), the Eighth Circuit allowed a broader scope of examination, sanctioning questions which fell "within the same time, geographical and substantive framework as the grand jury testimony." 600 F.2d at 1048.

If this Court rules that a deponent must answer questions based on prior immunized testimony, it must re-

solve the conflict between *Fleischacker* and *Starkey* and permit cross-examination so that defendants are not denied due process.

ARGUMENT

I. THE TRIAL COURT FAILED TO FOLLOW THE PROPER PROCEDURES IN DETERMINING WHETHER CONBOY COULD INVOKE HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

In determining whether a witness may invoke his fifth amendment privilege against self-incrimination, a court must follow a two-step procedure. First, the court must ascertain whether answers to the questions asked might tend to incriminate the witness. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *In re Corrugated Container Antitrust Litigation, Appeal of Conboy*, 661 F.2d 1145, 1149 n.7 (7th Cir. 1981) (en banc), *cert. granted sub nom. Pillsbury Co.* v. *Conboy*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825) (hereinafter cited as *Conboy*); *In re Corrugated Container Antitrust Litigation, Appeal of Franey*, 620 F.2d 1086, 1091 (5th Cir. 1980), *cert. denied sub nom. Adams Extract Co.* v. *Franey*, 449 U.S. 1102 (1981) (hereinafter cited as *Franey*).

Next, the court must ask whether there is a risk, even a remote risk, that the witness will be prosecuted for the criminal activities that his testimony may reveal. *Franey*, 620 F.2d at 1091. Because of the vital protection provided by the fifth amendment privilege

> [t]his Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action.

Maness v. *Meyers*, 419 U.S. 449, 461 (1975). Thus, the central standard for application of the privilege against self-incrimination is whether the claimant is confronted by substantial and real, and not merely trifling or imagi-

nary, hazards of incrimination. *United States* v. *Apfelbaum*, 445 U.S. 115, 128 (1980); *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); *Fleischacker*, 644 F.2d 70, 74 (2d Cir. 1981).

In the instant case, the district court failed to follow this two-step analysis when it ordered Conboy to answer the questions. The court failed to analyze particular questions to determine whether Conboy's answers could tend to incriminate him. *See* Deposition Transcript of John Conboy at 48-53 (dated May 20, 1981). Moreover, the court failed to consider whether Conboy faced a risk of prosecution. Instead, the court merely asked Conboy if *he* knew of any pending investigation by the Ohio authorities. *See* Deposition Transcript of John Conboy at 51-52 (dated May 20, 1981). Such a cursory determination of the risk of prosecution utterly fails to comport with constitutional requirements. The court's failure to make these determinations resulted in an inadequate record on which the court based its contempt order.

II. THE RIGHT OF CROSS-EXAMINATION IS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Cross-examination is an essential safeguard of our judicial system. Professor Wigmore, commenting on the importance of cross-examination, wrote that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, *Evidence* § 1367 (Chadbourn rev. 1974). Elaborating on the importance of this "legal engine," Wigmore continued:

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special excep-

> tion) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

Id. Thus, the Supreme Court has often recognized the vital function served by cross-examination, finding that this device

> is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.

Greene v. *McElroy*, 360 U.S. 474, 496-97 (1959) (citations omitted).

In *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974), this Court stated:

> Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested.

The Court noted that through cross-examination the witness' perceptions and memory, as well as his veracity, can be tested. Biases, prejudices, or ulterior motives of the witness may be brought to light through a probing cross-examination. *See also Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

As a result, cross-examination of a witness is a matter of right. *Alford* v. *United States*, 282 U.S. 687, 691 (1931).

III. IF THIS COURT PERMITS THE DEPONENT TO BE QUESTIONED FROM IMMUNIZED GRAND JURY TESTIMONY, ANY RULE SETTING THE SCOPE OF QUESTIONING MUST ALLOW ADEQUATE CROSS-EXAMINATION

If this Court decides that a deponent may be compelled to answer questions covering the subject matter explored in earlier immunized testimony (an issue which Mead does not address), it must further decide the scope of questioning permitted. The two circuit courts which permitted questioning of deponents who previously had given immunized testimony differed in their rulings on the scope of the questioning.

The Eighth Circuit in *Appeal of Starkey*, 600 F.2d 1043 (8th Cir. 1979), fashioned a somewhat broader rule than did the Second Circuit, holding:

> [A]ppellant is required to answer only questions which are within the same time, geographical and substantive framework as the grand jury testimony.

Id. at 1048. The Eighth Circuit determined that answers to questions falling within those limitations would be "tainted" and therefore unavailable to prosecutors in any subsequent prosecution. Thus, the deponent could be compelled to answer such questions and could not refuse to do so on the basis of his fifth amendment privilege.

In contrast, the Second Circuit in *Fleischacker*, 644 F.2d 70 (2d Cir. 1981), formulated a narrower test of permissible questions in its consideration of the issue. The Second Circuit agreed that a deponent may be questioned on topics covered in prior immunized testimony, but significantly narrowed the scope of permissible questions. The questions put to Fleischacker at his deposition were limited to "questions taken verbatim from, or based directly on, his immunized testimony." 644 F.2d at 73. The Second Circuit in *Fleischacker* disagreed with

the Eighth Circuit's ruling in *Starkey* as to the permissible scope of questioning, stating that "the scope of examination permitted under the . . . [Eighth Circuit's] standard is not sufficiently circumscribed. . . ." *Id.* at 79. Instead, the Second Circuit set down the following guideline:

> [D]istrict courts should not compel witnesses to respond to questions other than ones concerning specific subjects that actually were touched upon by questions appearing in the transcript of the immunized testimony.

Id. In making this determination, the district court was to refer to the transcript of the immunized testimony. As to questions taken verbatim from the grand jury transcripts, the Second Circuit ruled that the deponent had to answer. Other questions, however, were found to fall outside the permissible scope.

In formulating the rather nebulous tests outlining the permissible scope of questioning, neither the Eighth Circuit nor the Second Circuit considered the effect of its ruling on the right of cross-examination. This Court, however, should protect parties' cross-examination rights in fashioning any rule regarding the permissible scope of questioning lest the "legal engine of truth" be derailed. If the Court adopts a "verbatim" test, similar to the Second Circuit in *Fleischacker*, any right to cross-examination, in effect, will be nullified. While plaintiffs may track the direct questions of the Justice Department attorneys, defendants have no such verbatim script to follow since there was no cross-examination during either the Justice Department interview or the grand jury testimony. The Seventh Circuit recognized the defendants' "Catch-22" position in this situation:

> Plaintiffs have stated that they do not intend to ask any questions beyond those asked in the earlier transcripts. It is undisputed that Conboy has, and will exercise, his Fifth Amendment privilege to refuse to

> answer any such questions. Defendants will not, therefore, have any real opportunity to cross-examine at the deposition.

Conboy, 661 F.2d 1145, 1159 (7th Cir. 1981) (en banc), *cert. granted sub nom. Pillsbury Co.* v. *Conboy*, 50 U.S.L.W. 3547 (U.S. Jan. 11, 1982) (No. 81-825). Because a narrow "verbatim" test will decimate defendants' due process right of cross-examination, Mead asserts that, should this Court adopt a rule permitting deponents to be questioned concerning matters covered in their prior immunized testimony, the Court should ensure that the scope of permissible questioning is broad enough to encompass an effective cross-examination.

Under the Federal Rules of Civil Procedure, depositions may be taken "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). *See also* Fed. R. Civ. P. 30, 32. But if the questions are limited to the verbatim grand jury questions, then no discovery of admissible evidence is obtained at the deposition and, therefore, the deposition should not be permitted in the first place for that purpose. If the questions are for the purpose of introducing evidence at trial, the deposition also should not be permitted in the first instance if the questions are limited to grand jury questions.

Plaintiffs should not be permitted to bootstrap uncross-examined deposition testimony from uncross-examined immunized grand jury testimony and present it at trial as substantive evidence. As the Seventh Circuit noted in its *En Banc* opinion:

> In practical terms, there is no difference between a lack of opportunity for cross-examination at the grand jury and before the Justice Department and the lack of opportunity for cross-examination at a new deposition.

Conboy, 661 F.2d at 1159. Grand jury testimony, of course, is inadmissible as substantive evidence at trial,

since it is not subject to cross-examination. *Barber* v. *Page*, 390 U.S. 719 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *United States* v. *Thevis*, 665 F.2d 616 (5th Cir. 1982), *United States* v. *Marks*, 585 F.2d 164 (6th Cir. 1978); *United States* v. *Gonzalez*, 559 F.2d 1271 (5th Cir. 1977); *United States* v. *Fiore*, 443 F.2d 112 (2d Cir. 1971); *Young* v. *United States*, 406 F.2d 960 (D.C. Cir. 1968).

The effect of the position advocated by petitioners, however, is to attempt to circumvent that rule by changing the title of the transcript from "grand jury" to "deposition." The deposition contemplated by petitioners is to ask Conboy the identical verbatim questions from his grand jury transcript. When the defendant seeks to cross-examine, the deponent would likely assert his fifth amendment right in answer to those questions, since they would not be taken verbatim from the grand jury transcript, and the deponent, therefore, would fear that his answers would not be tainted by the prior grant of immunity. It will be as if the court reporter merely retyped the grand jury transcript and then typed "deposition" on the cover, and the defendant would forever be deprived of its right to cross-examine the testimony. When such deposition testimony would be based upon uncross-examined testimony, it should be inadmissible at trial. Otherwise, defendant's due process right to cross-examine that testimony would be circumvented.

CONCLUSION

For the foregoing reasons, Mead respectfully submits that this Court should first consider the threshold question of whether petitioners properly had possession of Conboy's grand jury transcript, which is the subject of a separate petition for writ of certiorari. Moreover, petitioners have framed the issue too narrowly in that if Conboy were only required to answer grand jury questions, then defendants would be denied their right of cross-

examination. Clearly, a ruling that a deponent is protected for only those answers to questions taken "verbatim or closely tracking" prior immunized testimony leaves no room for the defendant to pursue its due process right to conduct a full and fair cross-examination. Moreover, if the questions are so limited, then there is no basis for the deposition in the first place, since it is not taken for the purpose set forth in Rule 26, Fed. R. Civ. P.

Respectfully submitted,

HAROLD F. BAKER
ALAN WISEMAN
ANN I. KILLILEA
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 783-0800
Attorneys for
Defendant-Amicus Curiae
The Mead Corporation

February 25, 1982

Docket Sheet

NO. 81-825-CFX	TITLE	The Pillsbury Company, et al., Petitioners v. John Conboy

DOCKETED	COURT
Oct. 30, 1981	United States Court of Appeals for the Seventh Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Francis J. McConnell
	Counsel for Respondent: Michael W. Coffield,
Oct. 30, 1981	Petition for writ of certiorari filed. (Record filed)
Dec. 2, 1981	Brief of respondent in opposition filed.
Dec. 2, 1981	DISTRIBUTED. 1-8.
Dec. 10, 1981	Reply brief of petitioners filed. (D).
Jan. 11, 1982	Petition GRANTED. O'Connor, J., OUT .

Feb. 24, 1982	Joint appendix filed.
Feb. 24, 1982	Brief for the petitioners filed.
Feb. 25, 1982	Motion of Mead Corporation for leave to file a brief as amicus curiae filed.
Mar. 22, 1982	The motion of Mead Corporation for leave to file a brief as amicus curiae is GRANTED. O'Connor, J., OUT.
Mar. 27, 1982	Brief for the respondent filed.
Mar. 29, 1982	Motion of Philip L. Barnum, et al. for leave to file a brief as amici curiae filed.
April 7, 1982	Motion of petitioners to schedule oral argument during April 1982 session filed.
Apr. 13, 1982	DISTRIBUTED. 4-16. (Above motion).
Apr. 19, 1982	The motion of petitioners to schedule oral argument during April 1982 session is DENIED. The motion of Philip L. Barnum, et al. for leave to file a brief as amici curiae is GRANTED. O'Connor, J., OUT.
June 7, 1982	Reply brief for the petitioners filed.
July 13, 1982	CIRCULATED.
Oct. 6, 1982	ARGUED.